No. 714

Office-Supreme Court, U.S.
FILED
MAY 2 1951

IN THE

Supreme Court of the United States

October Term, 1950

EASTERN AIR LINES, INC.,

Petitioner,

—v.—

CIVIL AERONAUTICS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, AND BRIEF IN SUPPORT THEREOF

E. SMYTHE GAMBRELL,
W. GLEN HARLAN,
HAROLD L. RUSSELL,
CHARLES A. MOYE, JR.,
825 Citizens & Southern
National Bank Building,
Atlanta 3, Georgia
Attorneys for
Eastern Air Lines, Inc.
Petitioner

GAMBRELL, HARLAN & BARWICK,
Of Counsel.

May 2, 1951

SUBJECT INDEX

PAGE

PETITION FOR WRIT OF CERTIORARI 1

Statement of the Case 3

Jurisdiction 8

The Questions Presented 8

Reasons for Allowance of Writ of Certiorari 9

Conclusion 18

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI 21

Preliminary Statement 21

The Decision Below 21

Grounds for Writ of Certiorari 22

Statutory Provisions 22

Statement of the Case 23

Errors to be Urged 23

Summary of Argument 23

Argument 24

I. The Orders of the Board Here Complained of are Contrary to Law Because the Board Denied Eastern a Hearing With Respect to the Proposed Exemption 24

II. The Orders of the Board Here Complained of Are Contrary to Law Because the Board De-Forth Adequate Findings of Fact and They Are Unsupported by Substantial Evidence 51

Conclusion 66

APPENDIX A—PRIOR OPINION OF LOWER COURT 67

APPENDIX B—APPLICABLE STATUTORY PROVISIONS 73

TABLE OF AUTHORITIES

Cases

PAGE

Acquisition of Marquette by TWA—Supplemental Opinion, 2 C.A.B. 409 (1940) 47

Acquisition of Mayflower Airlines, Inc. by Northeast Airlines, Inc., 4 C.A.B. 680 (1944) 47

Alabama Power Company v. Ickes, 302 U. S. 464 (1938) 47, 49

Alaska Air Transp. Investigation, 2 C.A.B. 785 (1941) 29

American Eagle Fire Ins. Co. v. Jordan, 67 F. Supp. 76 (D.D.C. 1946) 38

California Employment Commission v. Malm, 59 Cal. App. (2d) 322, 138 P. (2d) 744 (1943) 32

Federal Communications Commission v. National Broadcasting Co., 319 U. S. 239 (1943) 13, 46

Florida v. United States, 282 U. S. 194 (1931) 52

Frost v. Corporation Commission, 278 U. S. 515 (1929) 13, 48, 49

Inland Motor Freight v. United States, 60 F. Supp. 520 (E. D. Wash., 1945) 53

Interstate Commerce Commission v. Louisville & Nashville Railroad, 227 U. S. 88 (1913) 32, 37

Londoner v. Denver, 210 U. S. 373 (1908) 50

New England Divisions Case, 261 U. S. 184 (1922) 38

New York Electric Lines v. Empire City Subway, 235 U. S. 179 (1914) 47

Ohio Bell Telephone Company v. Public Utilities Commission, 301 U. S. 292 (1937) 12, 35, 57, 63

Pan American Airways v. Civil Aeronautics Board, 121 F. (2d) 810 (C.C.A. 2d, 1941) 49

Panama Refining Co. v. Ryan, 293 U. S. 388 (1935) 13, 52, 60, 61

TABLE OF AUTHORITIES—Continued

PAGE

Re Large Irregular Carriers, Docket 3945, May 25, 1950 ..... 10, 12, 25

Reilly v. Pinkus, 338 U. S. 269 (1949) 50

Saginaw Broadcasting Company v. Federal Communications Commission, 96 F. (2d) 554 (App. D. C., 1938) 53

Schechter Poultry Corporation v. United States, 295 U. S. 495 (1935) 13, 60, 61, 62

Securities & Exchange Commission v. Chenery Corporation, 318 U. S. 80 (1943), 332 U. S. 194 (1947) 53

Standard Airlines v. Civil Aeronautics Board, 177 F. (2d) 18 (App. D. C., 1949) 45, 48

Tennessee Power Company v. Tennessee Valley Authority, 306 U. S. 118 (1939) 47, 49

The Chicago Junction Case, 264 U. S. 258 (1924) 38

Trans-Pacific Airlines v. Hawaiian Airlines, 174 F. (2d) 63 (C.C.A. 9th, 1949) 12, 38

United Air Lines, Inc.—Western Air Lines, Inc., Acquisition of Air Carrier Property, 8 C.A.B. 298 (1947) 47

United States v. Abilene & S. Ry., 265 U. S. 274 (1924) 38

United States v. Carolina Carriers Corporation, 315 U. S. 475 (1942) 40, 53, 54

United States v. Chicago, M., St. P. & R. R., 294 U. S. 499 (1935) 52, 53

Universal Camera Corp. v. National Labor Relations Board, 71 Sup. Ct. 456 (U. S. 1951) 14, 16, 17, 18, 34, 44

Wong Yang Sung v. McGrath, 339 U. S. 33 (1950) 14, 15, 16, 18, 42, 47

TABLE OF AUTHORITIES—Continued

Statutes

PAGE

Administrative Procedure Act (5 U.S.C. 1001 *et seq.*)

Section 2 ..... 18, 33
Section 5 ..... 14, 15, 33, 40
Section 6 ..... 52, 54, 55
Section 7 ..... 31, 32, 64, 65
Section 8 51
Section 9 ..... 2, 7
Section 10 ..... 8, 16, 31, 34

Civil Aeronautics Act of 1938, as amended (49 U.S.C. 401 *et seq.*)

Section 2 ..... 11, 12, 39
Section 401 ..... 5, 13, 25, 28, 29, 38, 45, 46, 52, 56, 58, 59
Section 403 25
Section 404 ..... 25, 30
Section 405 ..... 25, 30
Section 406 ..... 25, 58
Section 407 25
Section 408 ..... 25, 56, 59
Section 409 25
Section 410 26
Section 411 26
Section 412 ..... 25, 56
Section 415 26
Section 416 ..... 1, 3, 10, 11, 12, 14, 22, 24, 27, 28, 29, 30, 38, 39, 40, 43, 44, 45, 51, 56, 58, 62

TABLE OF AUTHORITIES—Continued

PAGE

Section 801 ..... 58, 59
Section 1002 ..... 56, 57
Section 1005 ..... 12, 31, 44, 45, 51, 57
Section 1006 ..... 8, 12, 31, 35, 63

Other

Attorney General's Manual on the Administrative Procedure Act (1947) 34

Congressional Record (Vol. 83) 11, 28, 43

Senate Judiciary Committee (Senate Document 248, 79th Cong. 2d Sess.) 34, 53, 55, 64, 65

Three Years of the Federal Administrative Procedure Act—A Study in Legislation (1950) 38 Geo. L. J. 579-581 ..... 15, 40

IN THE

Supreme Court of the United States

October Term, 1950

EASTERN AIR LINES, INC.,

Petitioner,

—v.—

CIVIL AERONAUTICS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, AND BRIEF IN SUPPORT THEREOF

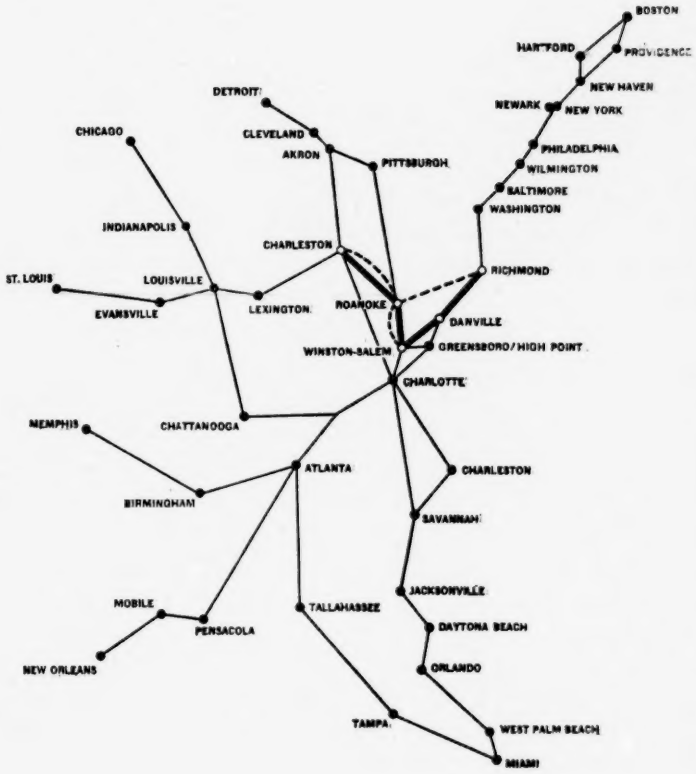
Your petitioner, Eastern Air Lines, Inc. ("Eastern"), respectfully submits this petition for writ of certiorari to review the judgment (R. 58) of the United States Court of Appeals for the District of Columbia Circuit entered and filed in that court on March 15, 1951, in the case of *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, No. 10,671, F. (2d) (App. D. C. 1951).

The Court of Appeals has affirmed orders of the Civil Aeronautics Board (R. 27, 49) granting to Piedmont Aviation, Inc. ("Piedmont") an exemption under Section 416 (b) of the Civil Aeronautics Act of 1938, as amended ("the Act"), permitting that carrier to duplicate exactly, on one daily round-trip flight, Eastern's certificated air transportation service between Winston-Salem, N. C. on the one hand and Roanoke, Va. and Charleston, W. Va. on the other hand (and to provide less directly competitive service between other points served by Eastern); and

the Court of Appeals has held that the Board acted properly in granting such exemption without making findings as required by law and without giving Eastern a hearing despite Eastern's seasonable and repeated request therefor.

Except for the fact that this case plainly is *not* moot, this case presents substantially the same legal issues as those presented in *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board,* No. 576, as to which this Court on April 9, 1951 granted certiorari, vacated the judgment of the Court of Appeals, and remanded the case to the Court of Appeals with directions to dismiss the proceeding as moot. This Court here has the opportunity of deciding the important questions which were presented in No. 576 but which could not be decided there because the Board's short-term exemption orders had become merged in a subsequently-granted certificate of public convenience and necessity. Here the short-term exemption order (originally scheduled to expire on December 12, 1950—R. 30) has been perpetuated indefinitely under Section 9 (b) of the Administrative Procedure Act by reason of the fact that a proceeding is pending before the Board for renewal of the authority granted in such order. Therefore, despite the Board's common practice in many other exemption cases of granting short-term exemption authority which might be deemed moot by the time the case could reach a reviewing court, there appears to be no possibility that this case will become moot before this Court has decided it.

MAP SHOWING PORTIONS OF EASTERN'S SYSTEM AFFECTED BY PIEDMONT'S EXEMPTION



Eastern services directly duplicated by Piedmont's exemption authorization.

Eastern services duplicated by Piedmont's operations under the exemption through connections with other airlines.

New direct Piedmont services authorized for the first time under the exemption.

Statement of the Case

Eastern is engaged in interstate air transportation of persons, property and mail pursuant to certificates of public convenience and necessity issued by the Board, among which are certificates authorizing service between Winston-Salem, Roanoke and Charleston, and between Winston-Salem, Danville, Va. and Richmond, Va., among many other points (see map opposite page 2 of this petition).

Piedmont is engaged in interstate air transportation of persons, property and mail pursuant to a certificate of public convenience and necessity issued by the Board, authorizing service between Greensboro/High Point, N. C., Danville, Roanoke and Charleston, and between Roanoke and Richmond, among other points (see map opposite page 4 of this petition).

As will be seen from the maps, Eastern has the *only* direct certificated route between Winston-Salem and Roanoke and Charleston, and between Winston-Salem and Richmond, whereas Piedmont has a certificated route designed to provide service between Greensboro/High Point, Danville, Roanoke and Charleston, and not between Winston-Salem and Roanoke, Charleston and Richmond.

Piedmont filed an application (R. 16) for exemption under Section 416 (b) of the Act to permit Piedmont to serve Winston-Salem as an intermediate point between Roanoke and Greensboro/High Point, alternate to Danville, the certificated intermediate point between those cities—thus providing direct point-to-point duplication of Eastern's Winston-Salem-Roanoke-Charleston route and providing less direct duplication of Eastern's Winston-Salem-Richmond service, as well as providing, through connections with other carriers at Richmond, Roanoke, Charleston, and Winston-Salem, service competitive with Eastern's service to the north and south of the area most directly affected

by the proposed exemption. Piedmont's application contained various allegations designed to support Piedmont's request, such as the alleged need for improved service between Winston-Salem and points to the east on Piedmont's system, the relative unimportance of Danville, and the claim that operating expense could be saved under the proposed exemption.

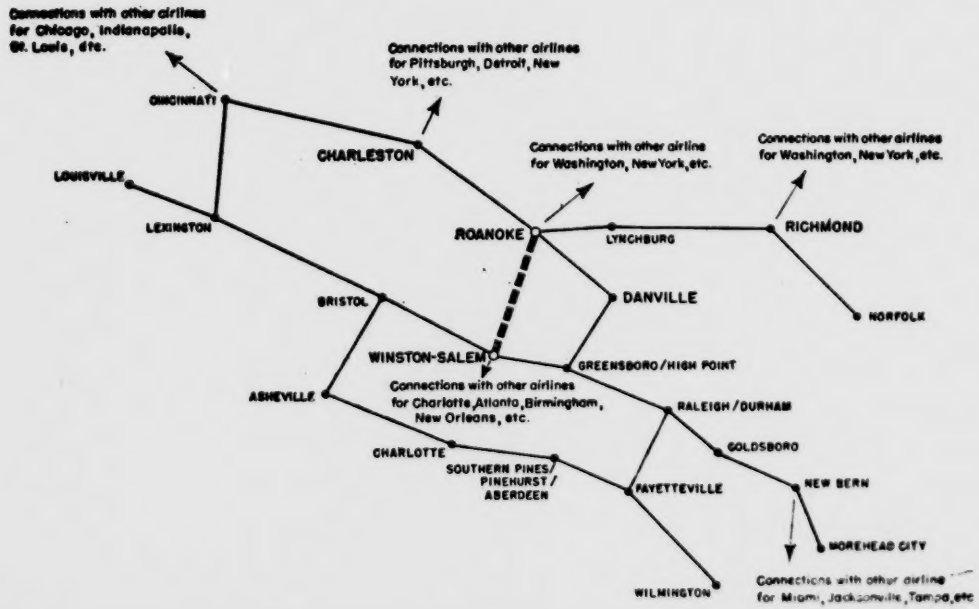
Eastern filed an opposition (R. 20) to Piedmont's exemption application because of the severe competitive implications of Piedmont's proposal. Eastern disputed all of Piedmont's factual allegations, pointed out the injury to Eastern which would result from the granting of Piedmont's application, and urged that the Board summarily deny Piedmont's application or, "in the alternative, that the Board set Piedmont's application down for public hearing."

Other documents were filed by Piedmont and Eastern (R. 23, 25) disputing each other's contentions, and the Danville Chamber of Commerce ("Danville") requested (R. 22) that the Board "take no action which would curtail, reduce, or otherwise cause any loss of service to and from Danville, Virginia, now being rendered by Piedmont Aviation, Inc.," and stated the desire of Danville to "become intervenors in connection with this proceeding" and to be "advised as to any docket numbers or as to any orders or requirements in connection with the application of Piedmont Aviation, Inc."

The Board granted the requested exemption (R. 27) without hearing, limiting service under the exemption to one daily round-trip flight and providing that the exemption should terminate on December 12, 1950. The order granting the exemption recited Piedmont's allegations without finding whether such allegations were true or not; recited that Eastern, Danville and State Airlines, Inc. had filed objections to the proposed exemption, but did not state

PIEDMONT'S ROUTE 87 AS OPERATED

(DOTTED LINE SHOWS OPERATION AUTHORIZED ONLY BY EXEMPTION)



what those objections were or whether they were justified, and "found" (a) that the exemption will "permit Piedmont to achieve economies in its operation and enable it to afford better service to the public," (b) that the exemption "will have no substantial adverse effect upon any other certificated air carrier," (c) that "in view of the foregoing considerations and the limited duration of Piedmont's certificate, the present enforcement of the provisions of Section 401 (a) of the Act, insofar as they prevent the service authorized herein, would be an undue burden on Piedmont by reason of the limited extent of, and the unusual circumstances affecting, its operations, and is not in the public interest," and (d) that "neither Eastern nor Danville have set forth matters warranting the relief each request."

Eastern filed a petition for hearing, argument and reconsideration (R. 31), pointing out the following among other facts:

(a) That the Board had made no findings that any of Piedmont's representations were true (R. 31);

(b) That the Board had stated no grounds for failing to give weight to the objections filed by Eastern and Danville (R. 32);

(c) That the Board's "findings" with respect to Piedmont's proposal were stated only in very general terms and in the language of the statute (R. 32);

(d) That the Board's "findings" with respect to the objections of Eastern and Danville likewise were stated only generally (R. 32);

(e) That the Board had granted Piedmont the equivalent of new route authority, exactly duplicating Eastern's certificated route, without hearing or evidence of any kind, and without giving Eastern or Danville the opportunity to show that such duplication would be unnecessary, wasteful and destructive (R. 33);

(f) That there is no justification in the Act for giving Piedmont an exemption without hearing simply because it is a "feeder" carrier (R. 35);

(g) That, in view of the fact that Eastern had disputed Piedmont's contentions, "A hearing would be the only means whereby the Board could obtain evidence to support the findings which are required as the basis for the Board's orders" (R. 36-37); and

(h) That the Board's action in granting the exemption was contrary to the Act and to well-established principles announced in prior decisions of the Board (R. 34-35).

Piedmont and Eastern filed additional documents (R. 40, 45) disputing each other's contentions.

The Board, again without hearing, issued an order (R. 49) denying Eastern's petition for hearing, argument and reconsideration, purporting to rely on "uncontroverted facts" (although there had been no hearing and no evidence and Eastern had disputed Piedmont's contentions); asserting that "there is no necessity, legal or otherwise, for holding a hearing in this proceeding"; stating that "the information submitted in this case" (which, of course, was not evidence since it had not been submitted at a hearing or subjected to cross-examination) led the Board to "believe that certain economies in Piedmont's operations will result from the exemption"; purporting to know, "from the scope and extent of Eastern's operations," that the revenue subjected to diversion by the exemption would be "only a very minor portion of its total passenger revenue"; and reasserting the contention that the Board may consider the burden of a hearing "undue" with respect to a carrier which "has only a temporary certificate and in all probability will be involved in renewal proceedings in the near future."

Eastern filed a petition for judicial review (R. 1) in the United States Court of Appeals for the District of Columbia Circuit. That court's decision (R. 58) affirmed the orders of the Board in a *per curiam* opinion referring to the decision of that court in *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board,* 185 F. (2d) 426 (App. D. C. 1950), in which case that court held that (1) the statute authorizes "the Board to grant, without hearing, exemptions from requirements that do not relate to pilots," and (2) the statutory requirement that the Board grant exemptions only "if it finds" that the statutory criteria have been met, means "little more than 'if it believes'" that the statutory standards permit such action. It was the latter decision of the Court of Appeals which was vacated by this Court as moot in No. 576, referred to above.

Inasmuch as the decision of the Court of Appeals in this case is a mere reference to its earlier decision reported at 185 F. (2d) 426, the latter opinion is printed for the convenience of this Court as Appendix A to this petition and brief.

Although, as indicated above, the Piedmont exemption order was originally scheduled to expire on December 12, 1950 (the date on which Piedmont's certificate of public convenience and necessity also was to expire), Piedmont filed some months before that date an application for renewal of its certificate authority (Docket 3727), which application contained a prayer for general relief, and the Board on November 27, 1950 (Order Serial No. E-4876) instituted a proceeding (Docket 4762) in which renewal of Piedmont's certificate with certain modifications (including certification of the authority covered by the exemption) was proposed. Section 9 (b) of the Administrative Procedure Act provides that: "In any case in which the licensee has, in accordance with agency rules, made timely

and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency." It is assumed that the Piedmont application referred to above and the proceeding instituted by the Board have the effect of a timely and sufficient application for a renewal of Piedmont's "license," including the exemption authority, and that therefore the exemption order will not expire until the Board has finally acted in the renewal proceeding. That proceeding is now in the very early stages, and in normal course will not be decided until long after the decision of this Court reviewing the judgment of the Court of Appeals. Consequently, it is submitted that there is no likelihood that the case will become moot prior to decision by this Court.

Jurisdiction

The Court of Appeals had jurisdiction pursuant to Section 1006 (a) of the Act (49 U. S. C. 646 (a)) and Section 10 of the Administrative Procedure Act (5 U. S. C. 1009). This Court has jurisdiction under Section 1006 (f) of the Act (49 U. S. C. 646 (f)) and 28 U. S. C. 1257.

The Questions Presented

The questions which this Court is requested to decide are:

(1) Whether the Board may lawfully grant an air carrier, by exemption, new route authority which duplicates existing certificate authority of other carriers, without granting a hearing to a carrier adversely affected by such exemption authority, if hearing is seasonably re-

quested; and (2) whether, even assuming that the Board may, without hearing, grant competitive new route authority by exemption, the Board may lawfully ignore the statutory requirement that exemptions be granted only after making findings as to "public interest" and as to "undue burden" on the carrier requesting the exemption, and that such findings be based on "substantial evidence."

Reasons For Allowance of Writ of Certiorari

(A) ***The decision of the Court of Appeals involves questions of general importance and the construction of United States statutes (the Civil Aeronautics Act and the Administrative Procedure Act) which have not been, but should be, settled by the Supreme Court.***

The decision of the Court of Appeals (R. 58 and App. A) makes, in substance, the following holdings which Eastern earnestly believes to be erroneous:

(1) That the Board has two alternative methods of granting new route franchises or authority—(a) it may follow the detailed procedure outlined in the Act and grant a certificate of public convenience and necessity *after notice and hearing and after making findings*, or (b) it may ignore such procedure completely and grant *the same authority*, by exemption, *without notice, hearing, or findings* (even though, in so doing, it seriously impairs or destroys other carriers' certificate rights which were obtained after the full hearing required by the Act and which were accepted by such carriers on the assurance of the Act that competition would not be authorized except in accordance with notice, hearing and findings based on the statutory standards)—and that the Board apparently may employ either method in its absolute and unlimited discretion; and

(2) That the Board may grant exemptions "from nearly all requirements of the Act" (App. A) without making any findings (although Section 416 (b) (1) of the Act permits the Board to grant exemptions only "if it finds" that certain conditions exist) "if it believes" that the required conditions exist and if such "belief" is "supported" by *ex parte* allegations of the applicant for exemption.

The decision of the Court of Appeals would lead to complete frustration of the basic purposes of the Act. The Board itself has held (*Re Large Irregular Carriers,* Docket 3945, May 25, 1950, pages 2-3, 4-5, 19) that:

(a) " * * * the primary objectives of the economic regulatory powers vested in the Board were the establishment of security of route as a basis for sound and orderly development and the elimination of the unrestricted and cutthroat competition which had brought the industry to its unhappy condition";

(b) "The keystone of the system there set forth is the requirement, in section 401 (a), that no carrier shall engage in air transportation unless there is in force a certificate of public convenience and necessity authorizing such transportation * * * ";

(c) " * * * the issuance of a certificate of public convenience and necessity is, and must be, the principal means of authorizing air transportation and * * * the power to grant such authority through exemption is sharply restricted and is to be employed only in the extraordinary case"; and

(d) The questions presented by applications for new route authority by exemption "raise difficult and complex issues which can be satisfactorily determined only after full hearing upon applications for certificates of public convenience and necessity."

The legislative history of the Act makes quite clear that Congress intended that new route matters be determined only after "full and complete hearings" (83 Cong. Rec. 6852).

Having established elaborate substantive and procedural safeguards to prevent authorization of wasteful competition (such safeguards including detailed statutory standards of public convenience and necessity and public interest (Section 2) and the requirement of a certificate of public convenience and necessity to be granted only after notice, hearing and findings, plus available judicial review), can it be supposed that Congress intended by Section 416 (b) (1) of the Act to permit the Board to abandon all such safeguards and, on the basis of the Board's own whimsy or "belief" unsupported by evidence or findings, to authorize unlimited competition by orders which, because of their lack of such support, could not be reviewed by any court and would not even apprise the interested parties of the reasons for the Board's action?

The lower court's decision, attributing to Congress an intent to establish such a self-destructive legislative program, seems plainly untenable. Numerous statutory indicia of Congressional intention to require hearings and findings based on evidence in exemption cases involving new route authority are discussed in the brief attached to this petition. In summary, those indicia include the following facts:

(1) As indicated above, the purpose of the Act is to establish "security of route"—a purpose which could not be achieved if the Board were enabled to disregard statutory standards and procedure and act on the basis of its unsupported "belief."

(2) Section 416 (b) (1) of the Act permits the Board to grant exemptions only "if it *finds* that enforcement of

this title . . . would be an undue burden . . . and is not in the public interest"; Section 1005 (f) requires that "*Every order* [including exemption orders] of the Authority shall set forth the *findings of fact* upon which it is based"; Section 1006 (a) provides for judicial review of "*Any order,* affirmative or negative"; and Section 1006 (e) provides that "The *findings of facts* by the Authority, *if supported by substantial evidence,* shall be conclusive" (Italics supplied)—all clearly demonstrating the intention of Congress that hearings be held in exemption cases in order that the required "findings" may be made and based on the "substantial evidence" which is necessary in order for exemption orders to be sustained on judicial review.

(3) The statutory provision for judicial review of "any order," even if standing alone, would compel the conclusion that a hearing must be had, for a court plainly cannot review an administrative decision based on "information secretly collected" or on facts which are "unknown and unknowable." *Ohio Bell Telephone Company* v. *Public Utilities Commission,* 301 U. S. 292, 302-303 (1937).

(4) The detailed legislative standards for Board action set forth in Section 2 of the Act, and made applicable to exemptions in Section 416 (b) (1), clearly require the exhaustive factual analysis which can be made only after full hearing. *Trans-Pacific Airlines* v. *Hawaiian Airlines,* 174 F. (2d) 63, 65 (C. C. A. 9th, 1949); *Re Large Irregular Carriers, supra,* page 19.

(5) Section 1005 (a) of the Act specifically authorizes the Board, *in emergencies* (there being no emergency or claim of emergency in this case), to act in exemption and other cases on the basis of "opinion" (*i.e.* "belief") and "without notice, hearing, or the making or filing of a report"—a clear indication that Congress meant the Board to have no such arbitrary power except under emergency

conditions, and then only with the safeguard that the Board shall "immediately initiate proceedings" to test the validity of the emergency action.

(6) If the Board were deemed to have the power to grant new route authority on the basis of a mere "belief," and without findings or evidence to explain or support such action, the statutory justification for such unlimited discretion would amount to an unconstitutional delegation of legislative power. *Panama Refining Co.* v. *Ryan,* 293 U. S. 388 (1935); *Schechter Poultry Corporation* v. *United States,* 295 U. S. 495, 537, 538, 551, 553 (1935).

(7) Certificated air carriers have a "conditionally exclusive" right created by their certificates—a right which may not, under the express provisions of Section 401 (h) of the Act, be amended or modified without notice and hearing; and the authorization by the Board of a competitive service which reduces or limits the effective market of a certificated carrier is an amendment or modification of its certificate. *Federal Communications Commission* v. *National Broadcasting Co.,* 319 U. S. 239 (1943).

(8) The "conditionally exclusive" property right of an air carrier in its certificate may not constitutionally be destroyed or impaired without notice and hearing. *Frost* v. *Corporation Commission,* 278 U. S. 515 (1929).

The foregoing factors clearly indicate that a hearing and findings based on evidence are required by the Act in exemption cases involving new route authority, such as that involved in this case.

(B) ***The decision of the Court of Appeals with respect to applicability of the Administrative Procedure Act is in conflict with the decisions of the Supreme Court in Wong Yang Sung v. McGrath, 339 U. S. 33 (1950) and in Universal Camera Corp. v. National Labor Relations Board, 71 Sup. Ct. 456 (U. S. 1951).***

The Court of Appeals has held that the hearing requirements of the Administrative Procedure Act (such requirements being imposed with respect to "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing"—Section 5) are not applicable to exemption proceedings such as this, apparently for the sole reason that Section 416 (b) (1) of the Civil Aeronautics Act does not specifically require a hearing (although it does require the Board to make findings which must be supported by "substantial evidence") whereas other portions of the Act specify hearings.

That ruling of the lower court is inconsistent with the decision of the Supreme Court in *Wong Yang Sung* v. *McGrath,* where this Court held that the hearing requirements of the Administrative Procedure Act were applicable even though the statute there involved did not specifically, or even impliedly, call for a hearing. This Court stated (339 U. S. 41) that "it would be a disservice to our form of government and to the administrative process itself if the court should fail, so far as the terms of the Act [Administrative Procedure Act] warrant, to give effect to its remedial purposes where the evils it was aimed at appear." The Court found that a hearing was required, despite the absence of a statutory provision therefor, because the constitutional right of liberty was at stake, and that therefore the Administrative Procedure Act applied as fully as if the hearing were specifically "required by statute."

Here, as demonstrated above, a hearing is required because the constitutional right of property is involved. But,

in addition, the plain statutory indicia discussed above demonstrate that a hearing is "required by statute" within the meaning of Section 5 of the Administrative Procedure Act. If, as this Court held in the *Wong Yang Sung* case, a constitutional implication of hearing is the equivalent of a hearing "required by statute," then surely a hearing implied from clear indications within the statute itself (particularly when supported by the constitutional necessity for a hearing in order to protect property rights in a certificate of public convenience and necessity) is a hearing "required by statute." In an article entitled "Three Years of the Federal Administrative Procedure Act—A Study in Legislation" (1950) 38 Geo. L. J. 579-581, Senator Pat McCarran, who is generally regarded as being the author of both the Civil Aeronautics Act and the Administrative Procedure Act, referred to the Supreme Court's decision in the *Wong Yang Sung* case holding "the Administrative Procedure Act applicable even in those cases in which the hearing requirement 'has been read into a statute . . . in order to save the statute from invalidity'," and stated as follows:

> "*A fortiori,* it would seem, the Act will apply where statutes do not use the magic word 'hearing' but refer to 'evidence,' or 'record' or some other equally plain indicia of a hearing. Moreover, those indicia need not indicate a need for both 'hearing' and 'decision on the record thereof.' In other words, the Administrative Procedure Act has survived academic and hair-splitting theories as to the source and statutory specification of hearing requirements."

The decision of the Court of Appeals conflicts (1) with the spirit of the *Wong Yang Sung* decision to the effect that the hearing requirements of the Administrative Procedure Act must be enforced by the courts "so far as the

terms of the Act warrant, to give effect to its remedial purposes where the evils it was aimed at appear"; (2) with the holding in the *Wong Yang Sung* case that a hearing requirement implied from the due process provisions of the Constitution is sufficient to invoke the Administrative Procedure Act; and (3) with the "*a fortiori*" result proceeding from the *Wong Yang Sung* decision that "plain indicia of a hearing" (such as the requirement in this case of "findings," which must be supported by "substantial evidence") will make the Administrative Procedure Act applicable.

The decision of the Court of Appeals further conflicts with the decision of this Court in *Universal Camera Corp.* v. *National Labor Relations Board,* 71 Sup. Ct. 456 (1951), where the Court held (71 Sup. Ct. 466) that the Administrative Procedure Act imposes on the Courts of Appeals "responsibility for assuring that the Board keeps within reasonable grounds," and stated that decisions of the agency must "be set aside when the record before the Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both." Here, of course, the Court of Appeals assumed no responsibility for the Board's decision, but concluded that the entire matter must be left in the uncontrolled and unreviewed discretion of the Board. And the "record" here—consisting of nothing which rises to the dignity of "evidence"—plainly "precludes the Board's decision from being justified by a fair estimate of the worth of the testimony," there being no testimony or other evidence.

Clearly the Court of Appeals cannot thus "abdicate the conventional judicial function" (71 Sup. Ct. 466).

The *Universal Camera Corp.* case involved the question of whether there was "substantial evidence" on the basis of the "whole record" as required by Section 10 (e) of the

Administrative Procedure Act. If the Court of Appeals is "responsible" for the reasonableness of the Board's decision in the light of evidence on the "whole record," and giving weight to an Examiner's Report as a part of that record (71 Sup. Ct. 467-469), what justification can there be for the decision of the Court of Appeals here, where it affirmed orders of the Board issued *without evidence of any kind,* and without a hearing and consequently without an Examiner's Report which could be given weight?

Plainly the Court of Appeals has not assumed its proper responsibility. Since the orders of the Board are not supported by "substantial evidence" of any kind—much less "on the whole record"—the orders must be set aside. The only alternative to that action would be a *de novo* hearing in which the Court of Appeals would assume full responsibility for evidence and findings. See discussion in the brief attached to this petition of the provisions of the Administrative Procedure Act requiring *de novo* hearings in court where hearings are not granted by the agency.

(C) *The decision of the Court of Appeals has so far sanctioned departure by the Board from the accepted and usual course of judicial or quasijudicial proceedings as to call for an exercise of the Supreme Court's power of supervision.*

As pointed out in some detail above, and as will be explained more fully in the brief attached to this petition, the decision of the Court of Appeals erroneously sanctions Board procedure whereby the Board may by-pass all of the substantive and procedural safeguards established by Congress in the Act to prevent the creation of uneconomic and wasteful air transportation services and to protect from unwarranted competition carriers which have obtained certificates of public convenience and necessity on the basis of the hearings, substantial evidence and findings

required by the Act. Moreover, although the Board's action in granting new route authorization by exemption is unquestionably "adjudication," by definition in the Administrative Procedure Act (Section 2 (d)), the decision of the lower court has approved adjudicatory procedure by the Board which furnishes no opportunity for hearing, which may rely entirely on *ex parte* representations by the applicant for new authority, and which makes no findings to apprise the parties or a reviewing court of the reason for the Board's action, and which, according to the lower court, may be based entirely on a "belief" which the Board has formulated without reference to anything which could be called evidence.

It is clear that the Board procedure which the decision of the Court of Appeals has approved is a most radical and dangerous departure from the accepted and usual course of judicial and quasijudicial proceedings, and the supervision of the Supreme Court plainly is required in order to correct the errors of the Board and the lower court.

CONCLUSION

From the foregoing, it is apparent that the questions raised by the decision of the Court of Appeals are of general importance, relating to the construction and application of statutes of the United States, and that such questions have not been, and should be, settled by the Supreme Court. It is further clear that there is a conflict between the decision of the lower court and the decisions of the Supreme Court in the *Wong Yang Sung* case and the *Universal Camera Corp.* case, and that such conflict should be resolved by the Supreme Court. Moreover, the decision of the lower court sanctions Board procedure which is so far removed from the accepted and usual course of quasijudicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue under the seal of this Court directed to the United States Court of Appeals for the District of Columbia Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and the proceedings of the Court of Appeals had in said cause, to the end that this cause may be reviewed and determined by this Honorable Court as provided by the statutes of the United States; and that the judgment herein of said Court of Appeals be reversed by this Honorable Court, and for such other and further relief as to this Court may seem proper.

Respectfully submitted,

E. SMYTHE GAMBRELL,
Attorney for Petitioner.

E. SMYTHE GAMBRELL,
W. GLEN HARLAN,
HAROLD L. RUSSELL,
CHARLES A. MOYE, JR.,

825 Citizens & Southern National Bank Bldg.,
Atlanta 3, Georgia,

Of Counsel.

IN THE

Supreme Court of the United States

October Term, 1950

EASTERN AIR LINES, INC.,

Petitioner,

—v.—

CIVIL AERONAUTICS BOARD,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

The Decision Below

The decision of the United States Court of Appeals with respect to which review is sought here has not yet been officially reported, but it is set forth in the printed record (R. 58). Inasmuch as the lower court's decision in this case merely refers to its decision in the case of *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board,* 185 F. (2d) 426 (1950), and therefore an understanding of the reasons for the decision here can be obtained only by reference to the previous decision by the same court, the opinion reported at 185 F. (2d) 426 is printed in full for the convenience of this Court and is attached as Appendix A to this brief.

The Court of Appeals affirmed orders of the Civil Aeronautics Board ("the Board") granting to Piedmont Avia-

tion, Inc. ("Piedmont") an exemption under Section 416 (b) (1) of the Civil Aeronautics Act ("the Act") whereby, despite the contrary requirements of Piedmont's certificate of public convenience and necessity, Piedmont was permitted to duplicate exactly the certificated service of Eastern Air Lines, Inc. ("Eastern") between Winston-Salem, N. C. on the one hand and Roanoke, Va. and Charleston, W. Va. on the other hand (and to duplicate somewhat less directly other services of Eastern). The maps inserted opposite pages 2 and 4 of the attached petition set forth the certificated services of Eastern and Piedmont and the duplication resulting from the exemption granted to Piedmont.

The decision of the Court of Appeals is that, even though the Act requires the Board to make findings before granting exemptions, and even though all orders of the Board are subject to judicial review and may be sustained only if the Board's findings are supported by "substantial evidence," the Board may grant new route authority in the form of exemptions without hearing and without findings—the requirement of "findings" being construed by the Court of Appeals to call for only a "belief" on the part of the Board "supported" by *ex parte* representations of the applicant for exemption.

Grounds for Writ of Certiorari

The grounds for seeking writ of certiorari are set forth in the annexed petition.

Statutory Provisions

The applicable statutory provisions are quoted in Appendix B to this petition and brief.

Statement of the Case

The facts material to the questions presented by the petition for writ of certiorari are set forth in full in the annexed petition, and will not be repeated here.

Errors to Be Urged

It is urged that the Court of Appeals erred in holding (1) that,—despite the fundamental purpose of the Act and clear indicia in the Act to the contrary, and despite serious constitutional questions raised by such holding,—no hearing is required prior to the granting by the Board of new route authority by exemption even though the certificate rights of other carriers may be impaired by such exemption authority, and (2) that no findings by the Board are necessary if the Board has a "belief," which is "supported" only by *ex parte* representations of the applicant for exemption, that the exemption may properly be granted.

Summary of Argument

The annexed petition for certiorari contains, under the caption "Reasons for Allowance of Writ of Certiorari," a reasonably concise summary of the arguments to be advanced by Eastern in this brief, and such summary will not be repeated here.

ARGUMENT

I.

The Orders of the Board Here Complained of Are Contrary to Law Because the Board Denied Eastern a Hearing With Respect to the Proposed Exemption.

The principal question involved in this case is whether the Board has power under the Act, the Administrative Procedure Act and the Constitution of the United States to grant to Piedmont, pursuant to the exemption provisions of the Act (Section 416 (b) (1)), new route authority exactly duplicating, and therefore seriously affecting, the certificated route of Eastern without holding a hearing as promptly and repeatedly requested by Eastern.

Stated differently, the question is whether the Board might lawfully subject Eastern and other carriers, in defense of their certificated routes, to a "trial by correspondence," in which the Board purports to determine facts and law on the basis of mere allegations made by each party and disputed by the other, unsupported by evidence, and in which both parties are deprived of the right to cross-examine each other's witnesses under oath and submit detailed data not available in public files or other recognized authoritative sources.

A. *If Competitive New Route Authority By Exemption Could Be Granted Without Hearing, the Basic Purpose of the Act Would Be Defeated.*

It is universally recognized that the primary purpose of the Act is to create safeguards against wasteful and destructive competition, and that the requirement of a certificate of public convenience and necessity is the keystone of the statutory plan to effectuate that purpose.

The Board itself has recognized this fact (*Re Large Irregular Carriers,* Docket 3945 *et al.,* page 3) in making the following statements with respect to the Act:

> "Its legislative history makes quite clear that the primary objectives of the economic regulatory powers vested in the Board were the establishment of security of route as a basis for sound and orderly development and the elimination of the unrestricted and cut-throat competition which had brought the industry to its unhappy condition.
>
> "These economic powers are described in Title IV of the Act. The keystone of the system there set forth is the requirement, in section 401 (a), that no carrier shall engage in air transportation unless there is in force a certificate of public convenience and necessity authorizing such transportation."

Title IV sets out in considerable detail the methods whereby the air transport industry and the public are to be protected against uneconomic competition and other improper practices. A certificate of public convenience and necessity is required; it may be granted only after application, notice, hearing and findings; it is subject to terms and conditions found to be in the public interest; and it may be amended, suspended, revoked or abandoned only after notice, hearing and findings (Section 401 (a), (b), (c), (d), (f), (g), (h), and (k)). Detailed standards are set up with respect to carriage of the mail (Section 401 (m) and (n) and Section 405), the filing and observance of tariffs (Section 403), the establishment of just and reasonable rates and services (Section 404), the establishment of mail rates (Section 406), the keeping of records (Section 407), the establishment of intercarrier agreements and relationships (Sections 408, 409 and 412), the supervision of gov-

ernment financial aid for carriers (Section 410), protection against unfair competition (Section 411), and investigations into air carrier management (Section 415).

The lower court's opinion states, in effect, that Congress, after specifying in great detail the duties of the Board and of air carriers, and the manner of performance of such duties, provided at the very end of that specification a complete "escape clause," giving the Board power to ignore the entire statutory scheme, relieve itself and air carriers of the duties imposed by the Act, and accomplish all this without notice, hearing, findings, evidence or any of the other protective measures provided in the Act.

It is impossible to believe that Congress would authorize the Board to abandon the entire statutory program of economic regulation without any standards by which such action might be tested (see discussion of the question of delegation of legislative power in Section II of this brief). It is especially clear that Congress did not leave the "keystone of the system" (the certificate of public convenience and necessity) as completely within the uncontrolled discretion of the Board as the lower court's opinion holds. It is not reasonable to suppose that Congress would set up an elaborate procedure for granting new route authority only after notice, hearing, argument and findings and then say to the Board:

"You may use this procedure or not, as you choose; and if you prefer not to have a hearing, then you may just grant an exemption to accomplish precisely the same thing without a hearing."

Congress cannot be presumed to have created two such completely inconsistent ways of doing the same thing. Why did Congress establish a very careful pattern for regulatory control if it meant in the end to authorize the Board to act arbitrarily and without standards and without making findings based on evidence?

The lower court's reasoning appears to be based on two erroneous premises: (1) that the requirement of a hearing in exemption cases would minimize the Board's exemption power; and (2) that the specific requirement of a hearing in other sections of the Act indicates that the lack of such specification in Section 416 (b) (1) was deliberate. The second premise will be discussed in some detail in subsection B of part I of this brief, demonstrating that the requirement of "findings" in Section 416 (b) (1) was intended by Congress to call for a hearing.

The lower court's first premise amounts to a contention that, in order to "preserve" the exemption power of the Board in its most extreme form (*i.e.*, a completely arbitrary power to exempt from all economic regulation, and without hearing or other protection for the public or other carriers), the Board should be authorized to disregard the entire statutory scheme. Surely the basic purpose of Congress in passing the Civil Aeronautics Act should be given greater weight than is given to the purely incidental purpose of permitting exemptions in cases of extreme hardship. The rule is far more important than the exception to it. To "preserve" the exemption power in extreme form while destroying the Act is like eviscerating the patient while attempting to save his toe. If the choice were presented, it seems clear that the toe should be sacrificed rather than the body. Here, however, both can and should be preserved.

The lower court's conclusion that hearings and findings are not required is the result of following superficial logic to an absurd end. Congress *specifically* required the Board to make findings before granting exemptions. Surely, in view of that requirement, it would be absurd to suppose that Congress meant, merely by omitting a specific requirement of a hearing, that the Board should be authorized to evade "nearly all requirements of the Act" (App. A) with-

out giving anyone notice, hearing, a statement of findings, or any opportunity to obtain effective judicial review.

An even further absurdity is this: that, according to the lower court's opinion, the *only* provision of Title IV of the Act from which the Board *cannot* grant an exemption without a hearing is Section 401 (l), which has to do with wages and hours of pilots. Surely it cannot be supposed that Congress was more concerned about protecting pilots from adverse changes in wages or hours than in protecting the air transport industry as a whole from destructive and generally uneconomic conditions and protecting the public from violations of the anti-trust laws, discriminations against communities and classes of traffic, etc. Any such supposition would be directly contrary to the announced primary purpose of the Act, as pointed out hereinabove, to provide for "the establishment of security of route as a basis for sound and orderly development." There are sufficient clear indications in Section 416 (b) (1) and elsewhere in the Act to establish that Congress had no intention of setting up a statutory pattern primarily for the benefit of pilots and designed to leave the protection and regulation of the industry as a whole and the advancement of the public interest to the uncontrolled discretion of the Board.

The lower court's apparent belief that the requirement of a hearing in exemption cases would partially nullify the exemption power seems to assume that the basic purpose of Section 416 (b) (1) was to exempt from *hearing*. Such was not the purpose. At the time the Act was passed, Senator Truman stated (83 Cong. Rec. 6726) the purpose to be "to enable the Authority to adjust some of the requirements of the law where necessary to encourage small operators, such as the small operators in Alaska, in cases of hardship."

Note that the word is "adjust," not "disregard." The obvious purpose was to enable the Board to relieve carriers from some of the substantive provisions of the Act which might be an "undue burden," such as requirements for detailed reports, for notice of proposed changes in tariffs and schedules, for keeping accounts in a particular form, etc. There are many possible exemptions as to which no one would request or desire hearing, and presumably as to most of those the Board could grant exemptions without hearing, treating the right to hearing as having been waived. It is submitted that the Congressional purpose was that, "in cases of undue burden," the Board might relieve the *carrier* from the *substantive requirements of the Act,* but Congress surely did not mean to relieve *the Board* from the duty of making the determinations and findings required by the Act.

It should be noted that Section 401 (c) of the Act states that "*the Authority* shall give due notice" of applications and such applications "shall be set for public hearing" (Italics supplied). It is clear that the duty of giving notice and holding a hearing is the duty of *the Board,* not of the applicant. Surely Congress did not intend to give the Board power to exempt *itself* from its statutory duties.

The Board itself has recognized that Section 416(b) "contemplates only a power to relieve an air carrier from the necessity of conforming to those requirements of the Title which are subject to enforcement by the Board in the ordinary sense, rather than from a statutory condition attached to the right to obtain a franchise." *Alaska Air Transp. Investigation,* 2 C. A. B. 785, 793 (1941). Notice and hearing are "statutory conditions" to the right to a franchise under Section 401.

The exemption power of the Board is most extensive, and will not be "nullified" or substantially limited, even though hearings are required in some instances. Even the

power to exempt, after hearing, from the certificate provisions is very sweeping in character, as such an exemption presumably relieves the carrier from the obligations attached to a certificate—including the duty to provide adequate transportation (Section 404 (a)), the requirement of carrying mail in accordance with regulations of the Postmaster General (Section 405 (g)), etc. Certainly such relief should not be granted without hearing where an affected carrier, the Postmaster General, or other representative of the public desires to be heard.

Far from nullifying the exemption power, the requirement of hearing in cases such as this will preserve that power in the form intended by Congress, providing necessary protection to the industry and the public while permitting relief where it is properly established that an "undue burden" would otherwise exist.

B. ***Clear Statutory Indicia Establish That a Hearing Is Required Before Granting of New Route Authority by Exemption.***

Aside from the fact, demonstrated above, that the basic purpose of the Act—protection of the public and the air transport industry—is inconsistent with the unrestrained power of exemption, without hearing, findings or evidence, which the lower court's decision would grant to the Board, there are clear indications in the statutory language that a hearing is required before the granting of new route authority by exemption. Among other indicia are the following:

Section 416 (b) (1) of the Act authorizes the Board to grant an exemption to an air carrier only "if it *finds* that the enforcement of this title * * * would be an undue burden on such carrier * * * by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier * * * and is not in the public interest" (Italics supplied).

Section 1005 (f) of the Act requires that *"Every order* of the Authority shall set forth the *findings of fact* upon which it is based" (Italics supplied).

Section 1006 (a) provides for judicial review of *"Any order,* affirmative or negative, issued by the Authority under this Act * * *" (Italics supplied).

Section 1006 (e) of the Act provides that, upon judicial review of the Board's orders, "The *findings of facts* by the Authority, if supported by *substantial evidence,* shall be conclusive" (Italics supplied).

Section 10 of the Administrative Procedure Act likewise provides for judicial review of orders of the Board, and requires the reviewing court to set aside any action of the Board found to be "unsupported by substantial evidence."

The foregoing statutory provisions demonstrate that (1) the Board is required to make findings of fact in support of an exemption order, (2) findings of fact must be supported by "substantial evidence," and (3) if the reviewing court can find in the record on appeal no "substantial evidence" which justifies the action of the Board, the exemption order must be set aside.

It should be immediately apparent from a casual study of the facts of this case that there is and could be no evidence of any kind in support of the Board's orders. The record consists entirely of the *allegations* of Piedmont and the *counter-allegations* of Eastern, together with the Board's orders. Certainly there is nothing in such material which could be called "evidence," much less "substantial evidence."

It is axiomatic that evidence cannot be obtained except through some form of hearing. It is true that Section 7 (d) of the Administrative Procedure Act permits official notice by the agency with respect to facts which are a matter of common knowledge or may otherwise be accepted as authoritative without proof. However, even in the case of

official notice, the Board would be required under Section 7 (d) of the Administrative Procedure Act to afford Eastern "an opportunity to show the contrary," which of course amounts to a hearing with respect to matters so noticed.

Eastern repeatedly demanded a hearing, and pointed out that there were no facts of record or facts which could be officially noticed by the Board which would support the Board's conclusion, and that the only way that any such facts could be developed would be through a hearing.

Not only is it necessary to have some form of hearing in order to obtain "evidence," but it is obvious that a finding cannot be made (as required by the Act) except on evidence obtained at a hearing.

As was stated in *California Employment Commission* v. *Malm*, 59 Cal. App. (2d) 322, 138 P. (2d) 744, 746 (1943), with respect to the word "finding":

> "Where the word is used in a statute conferring quasi-judicial functions upon an administrative body it implies that the body has conducted some sort of a hearing, or investigation of the facts, upon which it may reach the conclusion that these facts are true."

Likewise, in *Interstate Commerce Commission* v. *Louisville & Nashville Railroad,* 227 U. S. 88, 91 (1913), the Court stated:

> "In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence' [citing cases] or if the facts found do not, as a matter of law, support the order made" (citing cases).

The requirements with respect to hearing, findings and evidence, as established in judicial decisions, have been strengthened and confirmed by Congress in the Administrative Procedure Act, Section 5 of which provides as follows:

> "In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing [with certain exceptions not here pertinent]—
>
> "(b) PROCEDURE.—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing and decision upon notice and in conformity with sections 7 and 8."

It will be noted that Section 5 applies only where a "case of adjudication" is "required by statute to be determined on the record after opportunity for an agency hearing." Clearly the instant case is one of "adjudication" (Administrative Procedure Act, Section 2 (d) and (e)). Likewise it is clear that the Civil Aeronautics Act requires a hearing, since the Board is required to make findings, which findings must be based on evidence, and the Board's orders are subject to reversal by the court if unsupported by "substantial evidence." It might be noted further that, if it were to be concluded that the statute does not require a hearing before the Board, Eastern would nevertheless be entitled to a hearing—in the form of a *de novo* trial in court. This appears from the following statements made by the sponsors of the Administrative Procedure Act:

Senate Judiciary Committee (Senate Document 248, 79th Cong., 2d Sess., p. 22):

> "There should be no disposition to compel administrative hearings where Congress has not already so provided because, as pointed out below in connection with judicial review, the established law permits a trial *de novo,* of the facts in all cases of adjudications where statutes do not require an administrative hearing."

Senate and House Committees (Senate Document 248, pp. 214, 279):

> "The sixth category [Section 10 (e) (6)], respecting the establishment of facts upon trial *de novo,* would require the reviewing court to determine the facts in any case of adjudication not subject to sections 7 and 8."

Thus it will be seen that the sponsors of the Administrative Procedure Act contemplated that a party would be entitled to a trial *de novo* in any case of adjudication (such as this clearly is) where the statute did not require a hearing before the agency.

See also the Attorney General's Manual on the Administrative Procedure Act (1947) at pp. 109-110.

If, as this Court has held in *Universal Camera Corp.* v. *National Labor Relations Board,* 71 Sup. Ct. 456, 466 (1951), the Court of Appeals now has "responsibility for assuring that the Board keeps within reasonable grounds," and for "enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals," such responsibility must be assumed by the court in one of two ways: (1) by reviewing and remanding decisions which have insufficient eviden-

tiary basis (or, as here, *no* such basis); or (2) by affording a *de novo* trial where no evidence was submitted to the agency. That is the pattern of justice contemplated by the authors of the Administrative Procedure Act, as is apparent from the above quotations.

It would be absurd to suggest that the statute does not require a hearing in this case and that therefore Eastern is remitted to a trial *de novo* in court. Such a suggestion would be contrary to the entire pattern of the Civil Aeronautics Act, which plainly requires findings by the Board and review of such findings by the court.

The statutory provision (Section 1006 (a) of the Act) that "Any order * * * shall be subject to review by the circuit courts of appeals," and the provision (Section 1006 (e) of the Act) that "The findings of facts by the Authority, if supported by substantial evidence, shall be conclusive," furnish indisputable proof that the statute requires a hearing with respect to exemption orders of the type here involved. How could the court review the Board's order and determine if the findings were supported by "substantial evidence" unless there had been a hearing in which had been submitted something the court could recognize as evidence? Clearly the court cannot review the undisclosed mental processes of the Board members, and the court cannot treat the unsupported allegations and counter allegations of Piedmont and Eastern as evidence.

That a hearing is a prerequisite to judicial review is well illustrated by the Supreme Court in *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292, 302-303 (1937), where the Court noted that the administrative agency had based its decision on "information secretly collected" without hearing or opportunity to the parties to rebut or cross-examine. With respect to such procedure, Mr. Justice Cardozo stated for the Court:

"From the standpoint of due process—the protection of the individual against arbitrary action—a deeper vice is this, that even now we do not know the particular or evidential facts of which the Commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown; there is no way to find them out. When price lists or trade journals or even government reports are put in evidence upon a trial, the party against whom they are offered may see the evidence or hear it and parry its effect. Even if they are copied in the findings without preliminary proof, there is at least an opportunity in connection with a judicial review of the decision to challenge the deductions made from them. The opportunity is excluded here. The Commission, withholding from the record the evidential facts that it has gathered here and there, contents itself with saying that in gathering them it went to journals and tax lists, as if a judge were to tell us, 'I looked at the statistics in the Library of Congress, and they teach me thus and so.' This will never do if hearings and appeals are to be more than empty forms."

* * * * *

"To put the problem more concretely: how was it possible for the appellate court to review the law and the facts and intelligently decide that the findings of the Commission were supported by the evidence when the evidence that it approved was unknown and unknowable?"

That reasoning is equally applicable here. While the Board has stated certain conclusions as to Piedmont's exemption application, there is no way for the court to ascertain what facts, if any, the Board considered in reaching its decision. The only way in which the court could

effectively review the Board's orders would be to require a full hearing before the Board in which evidence may be presented.

Again in *Interstate Commerce Commission* v. *Louisville & Nashville Railroad, supra,* the Court stated (227 U. S. at 91) that "A finding without evidence is arbitrary and baseless," and (227 U. S. at 92) that "A finding without evidence is beyond the power of the Commission," and (227 U. S. at 93) "manifestly there is no hearing when the party does not know what evidence is offered or considered, and is not given an opportunity to test, explain, or refute." The Court further stated (227 U. S. at 93):

> "The Commission is an administrative body and, even where it acts in a quasi-judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. Interstate Commerce Commission v. Baird, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. Rep. 563. But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information, as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown, but presumptively sufficient information to support the finding. Interstate

Commerce Commission v. Baltimore, &c. R. R., 226 U. S. 14, 57 L. ed. ——, 33 Sup. Ct. Rep. 5."

In *United States* v. *Abilene & S. Ry.,* 265 U. S. 274, 288 (1924), Mr. Justice Brandeis, speaking for the Court, stated as follows: "But a finding without evidence is beyond the power of the Commission. Papers in the Commission's files are not always evidence in a case. *New England Divisions Case,* 261 U. S. 184, 198, note 19, 43 Sup. Ct. 270, 67 L. Ed. 605. Nothing can be treated as evidence which is not introduced as such." See also *The Chicago Junction Case,* 264 U. S. 258, 263 (1924).

It follows inevitably that the statutory provision for judicial review of the Board's orders requires that the Board hold a hearing in exemption cases such as this in which "substantial evidence" supporting the Board's ultimate order may be presented and fully tested by cross-examination. Any other interpretation of the Act would render the judicial review provision a nullity. See also *American Eagle Fire Ins. Co.* v. *Jordan,* 67 F. Supp. 76, 82 (D. D. C. 1946).

A brief examination of the Board's duties in passing on an application for exemption under Section 416 of the Act will demonstrate the absolute necessity of a hearing. As the court pointed out in the case of *Trans-Pacific Airlines* v. *Hawaiian Airlines,* 174 F. (2d) 63, 65 (C. C. A. 9th, 1949):

"It is immediately discovered that any consideration of the scope of the exemption required a detailed examination of the economic situation of Trans-Pacific and of the public policy involved.

"The Board is given power to issue a certificate of public necessity and convenience, which will give a carrier a right to engage in air transportation, §401

(a). The Board is given power to exempt from the requirement of this title or any provision thereof or any rule, regulation, term, condition or limitation prescribed thereunder, any air carrier or class of air carriers. The exercise of this latter power is conditioned upon a finding by the Board 'that the enforcement of this title' or 'such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers.' Not only that, but the Board must find this 'undue burden' occurs 'by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest' §416 (b) (1).

"In the light of these statutory provisions the function of the Board was legislative or administrative. The Board, whether it dealt with a single air carrier or a class of air carriers, was concerned with the economic condition thereof and practices and activities in the future. No exemption could be granted, limited, or complete without performance of this condition precedent."

Not only must the Board make "a detailed examination of the economic situation" of Piedmont before it can grant an exemption, but it must also find that the exemption would be "in the public interest." The Act contains a definition of "public interest" (Section 2) which requires the Board to determine whether the proposed exemption would (a) encourage and develop an air transportation system properly adapted to the needs of the Nation; (b) recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in air transportation, and improve the relations between, and coordinate transportation by, air

carriers; (c) promote adequate, economical and efficient service at reasonable charges, without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices; (d) create competition to the extent necessary to assure sound development of an adequate air transportation system; (e) promote development and safety of air commerce; and (f) encourage and develop civil aeronautics.

Obviously, the Board could not perform its statutory functions in ruling on the application for exemption without making a detailed study of Piedmont's operations and economic condition, and the operations and condition of other carriers which might be affected by Piedmont's proposed exemption, and the many public interest factors prescribed in the statute—and such a study could not properly be made without a hearing. The necessity for full study and application of the statutory standards is emphasized by the Supreme Court in *United States* v. *Carolina Carriers Corporation,* 315 U. S. 475, 489 (1942).

The lower court's opinion asserts that hearing in exemption cases is not required by the Administrative Procedure Act, and assumes that, because Congress did not specifically provide for a hearing in Section 416 (b) (1), no such hearing is "required by statute" within the meaning of Section 5 of the Administrative Procedure Act. An eloquent rebuttal of that assumption is the following quotation from an article ("Three Years of the Federal Administrative Procedure Act—A Study in Legislation" (1950) 38 Geo. L. J. 579-581) written by Senator Pat McCarran, who is generally regarded as being the author of *both* the Civil Aeronautics Act and the Administrative Procedure Act:

> "Shortly after the adoption of the Act [Administrative Procedure Act] it came to be widely assumed among agencies that, unless the statute authorizing an

administrative function *expressly* required a hearing, the Administrative Procedure Act did not apply. Some went further and assumed that sections 5, 7, and 8 of the Act did not apply unless there was express statutory requirement not only of a 'hearing' but of decision 'on the record' as well. Still another form of contention was that, although hearings might be required by 'law' in the sense that constitutional requisites could not be met without a hearing at the administrative level, such situations were to be distinguished from those in which statutes themselves plainly stated the hearing prerequisite.

"But all of these arguments were simply forms of words whereby it was sought to distinguish between statutory hearings and hearings supposedly otherwise somehow required by law. Of course Congress not only made no such distinction in the Administrative Procedure Act, but had no reason to do so. It was also a piece of hypertechnical legalism to so attempt to distinguish between 'express' and 'implied' statutory requirements, to say nothing of statutory language between those extremes. More plausible was the notion that there could be 'constitutional' hearings as distinguished from statutory ones except that in our system the prescription of methods of administration—whether by formal hearings or summary 'non-hearing' procedures—is traditionally the function of Congress. Generally speaking the Constitution forbids; it does not prescribe what statutes omit. Unfortunately the art of legislative drafting is not so precise that the words 'hearing' or 'record' are always used even where Congress intends to require them and, knowing that, Congress would not assume to distinguish hearing functions on the grounds suggested. Nevertheless for three years the issue was

whether Congress did just that in prescribing the applicability of the Administrative Procedure Act's important provisions.

"In the main the lower federal courts adopted these administrative views in a variety of situations. On February 20 last, however, the Supreme Court set the issue at rest on broad grounds in the *Sung* case where it held the Administrative Procedure Act applicable even in those cases in which the hearing requirement 'has been read into a statute * * * in order to save the statute from invalidity.' *A fortiori,* it would seem, the Act will apply where statutes do not use the magic word 'hearing' but refer to 'evidence,' or 'record' or some other equally plain indicia of a hearing. Moreover, those indicia need not indicate a need for both 'hearing' and decision 'on the record thereof.' In other words, the Administrative Procedure Act has survived academic and hair-splitting theories as to the source and statutory specification of hearing requirements."

The "*Sung* case" referred to by Senator McCarran is *Wong Yang Sung* v. *McGrath,* 339 U. S. 33 (1950), in which the Supreme Court pointed out that "it would be a disservice to our form of government and to the administrative process itself if the court should fail, so far as the terms of the Act warrant, to give effect to its remedial purposes where the evils it was aimed at appear." It is evident from Senator McCarran's article that one of the "evils" at which the Administrative Procedure Act was aimed was just such arbitrary action as the Board has taken in this case without notice or hearing. Congress obviously intended that no technical interpretation should be placed on the absence of the "magic word 'hearing'" from the statute, and the requirements that the Board may

act only "if it finds" certain things, that its findings must be supported by "substantial evidence" and that the Board's orders in exemption cases are subject to judicial review constitute "plain indicia of a hearing" which, in the language of Senator McCarran, lead *"a fortiori"* to the conclusion that the Administrative Procedure Act will apply.

Senator McCarran's present views with respect to the need for hearing are exactly the same as those which he expressed to the Senate at the time the Civil Aeronautics Act was being passed. As author and sponsor of that legislation, Senator McCarran stated (83 Cong. Rec. 6852):

> "If it could be established to the satisfaction of the Authority which is about to be set up that another line could well be operated from Chicago to Salt Lake City, although that same territory is now served by the United Air Lines, and the demand for service was so great as to support another line, then the Authority could investigate, reach a determination, establish a rule, and could say, 'There is sufficient demand, there is sufficient patronage, and there is sufficient commercial life to sustain the other lines. Therefore, we can grant a franchise to another line.' *But before that could be done, full and complete hearings would have to be had"* (Italics added).

It should be noted that at the time Senator McCarran stated that "full and complete hearings would have to be had," Section 416 (b) (1) was in the proposed bill in substantially its present form (83 Cong. Rec. 6756). The lower court's conclusion that the Board has the power to establish a Chicago-Salt Lake City route by exemption without full hearing is directly contrary to the understanding which Congress had of the legislation at the time it was passed.

The decision of this Court in *Universal Camera Corp.* v. *National Labor Relations Board, supra,* likewise demonstrates that the Administrative Procedure Act requires a hearing in this case. As this Court held, the Administrative Procedure Act requires the Court of Appeals to examine the "whole record"—including an Examiner's Report—to determine the substantiality of evidence relied on by the administrative agency in every case of "adjudication," such as this. Where, as here, such an examination reveals *no evidence at all* because hearing was denied, the agency decision must be set aside.

The lower court's opinion states (App. A) that, because Section 416 (b) (2) of the Act—relating to pilots' pay—specifically requires a hearing while Section 416 (b) (1) specifies only that the Board make findings, "Congress could hardly have made clearer its intention to authorize the Board to grant, without hearing, exemptions from requirements that do not relate to pilots." As pointed out above, it is impossible to believe that Congress was so much concerned about pilots and so little concerned about the general public and the entire air transportation industry that it required due process protection only for the pilots and authorized the Board to act without hearing or other safeguards in creating unlimited competition, permitting unrestricted violation of the anti-trust laws, giving unlimited subsidy to airlines, etc. But if such had been the intention of Congress, it certainly could have made its purpose much clearer. It could have omitted the requirement of "findings"; it could have specifically authorized the Board to act on the basis of "belief" or "opinion"; and it could have said in so many words that the Board might act "without hearing."

Congress has demonstrated clearly in the Act that it knows how to authorize the Board to act without hearing. Section 1005 (a) of the Act provides that: * * * "whenever

the Authority is of the *opinion* that an *emergency* requiring immediate action exists in respect of safety in air commerce, the Authority is authorized, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other form of pleading by the interested person or persons, and with or *without notice, hearing, or the making or filing of a report,* to make such just and reasonable orders, rules, or regulations, as may be essential in the interest of safety in air commerce to meet such emergency; *Provided further,* That the Authority shall immediately initiate proceedings relating to the matters embraced in any such order, rule, or regulation, and shall, insofar as practicable, give preference to such proceedings over all others under this Act."

If Congress had intended to give the Board power to grant exemptions without notice, hearing or findings, why did it not express itself plainly in Section 416 (b) (1) as it did in Section 1005 (a)? The plain fact is that Congress did not mean to have the Board act in that fashion *except in emergency,* and then Congress very carefully provided that the Board must give *prompt* opportunity for affected parties to test such action in a regular proceeding. It should be emphasized that Section 1005 (a) relates to *all* functions of the Board, *including the granting of exemptions.* When that provision is read with Section 416 (b) (1), it is entirely clear that, in the normal situation (such as that presented in this case) where there is no emergency, the Board is not authorized to act without notice, hearing, findings, or on the basis of a mere "opinion" or "belief." See *Standard Airlines* v. *Civil Aeronautics Board,* 177 F. (2d) 18, 21 (App. D. C., 1949).

A further provision of the Act which requires that a hearing be afforded before competitive new route authority may be granted by exemption is Section 401 (h), which provides that the Board may "alter, amend, modify,

or suspend" a certificate of public convenience and necessity only *"after notice and hearing."* In *Federal Communications Commission* v. *National Broadcasting Co.,* 319 U. S. 239, 244-245 (1943) the Supreme Court held that the granting of a competing radio license has such an adverse effect on the original exclusive license as to amount to a "modification" thereof. The same is true in the case of air carrier route authorizations. While it was electrical interference which was involved in the *National Broadcasting Co.* case, the only *effect* of such interference was to deprive the first licensee of part of its former audience and business—just as the authorization of a competitive air carrier deprives the original carrier of its former traffic. The fact that a different form of interference is involved does not change the basic principle.

The granting to Piedmont in this case of new route authorization by exemption has permitted Piedmont to provide as much and as direct service between Winston-Salem, Roanoke and Charleston, W. Va. as Eastern provides under its certificate of public convenience and necessity. Thus, the exemption amounts to a division of Eastern's certificate authority, and the delivery of half of that authority to Piedmont, thus severely reducing the value of Eastern's certificate rights and diminishing the effective market for Eastern's services in the area involved. That amounts to an amendment or modification of Eastern's certificate, and notice and hearing were therefore required under Section 401 (h) of the Act.

C. *The Constitutional Principles of Due Process Require That Eastern Be Given a Hearing Before Its Certificate Property Right Is Impaired.*

The lower court's opinion recognizes that, under the decision of the Supreme Court in *Wong Yang Sung* v. *McGrath, supra,* Eastern is entitled to a hearing under the Administrative Procedure Act if the Constitution requires a hearing, even though the Civil Aeronautics Act does not specifically mention "hearing" as a requirement in exemption proceedings of this type. However, that opinion characterizes Eastern's complaint as being solely against "damage by competition which it says was made possible by unauthorized administrative action," and the lower court concludes that "The Constitution does not guarantee protection against such damage." In support of that proposition the lower court cites *Alabama Power Co.* v. *Ickes,* 302 U. S. 464 (1938) and *Tennessee Power Co.* v. *Tennessee Valley Authority,* 306 U. S. 118 (1939).

Eastern's complaint cannot be so easily disposed of. It is well settled that a certificate of public convenience and necessity (a franchise), such as Eastern's, is a "property interest" entitled to protection against impairment by arbitrary action. The Board itself has held such certificates to be "property" having substantial value. *Acquisition of Mayflower Airlines, Inc., by Northeast Airlines, Inc.,* 4 C. A. B. 680, 684 (1944); *Acquisition of Marquette by TWA—Supplemental Opinion,* 2 C. A. B. 409, 413 (1940); and *United Air Lines, Inc.—Western Air Lines, Inc., Acquisition of Air Carrier Property,* 8 C. A. B. 298, 311-316 (1947). The courts have reached the same conclusion. Thus, in *New York Electric Lines* v. *Empire City Subway,* 235 U. S. 179, 193 (1914), the Court held that a franchise is "property" which is "made and received with the understanding that the recipient is protected by a

contractual right from the moment the grant is accepted and during the course of performance as contemplated." Likewise in *Frost* v. *Corporation Commission,* 278 U. S. 515, 519-520 (1929) the Court held that a license granted to a cotton ginning company was "property" because (1) the statute declared such a company to be a public utility, (2) any such company was required to obtain a permit to do business, (3) such companies were regulated the same as transportation companies, and (4) a permit to engage in the business was denied in any case where there was "no public necessity for it." *Cf. Standard Airlines* v. *Civil Aeronautics Board, supra,* 177 F. (2d) 20.

In the *Frost* case the Court went further and held—directly in point here—that where a license is granted under a statutory provision requiring proof of public necessity, that license cannot lawfully be impaired by the grant of a competitive license *without notice and hearing,* and a specific statutory authorization for such a grant without hearing is unconstitutional. The Court stated as follows (278 U. S. 521): "While the right thus acquired does not preclude the state from making similar valid grants to others, it is, nevertheless, exclusive against any person attempting to operate a gin without obtaining a permit or, what amounts to the same thing, against one who attempts to do so under a void permit; in either of which events the owner may resort to a court of equity to restrain the illegal operation upon the ground that such operation is an injurious invasion of his property rights."

Here precisely the same reasoning applies. Eastern has received certificates of public convenience and necessity pursuant to a statute which requires notice and hearing before competitive certificates can be granted, which prohibits the authorization of competition except "to the extent necessary" to attain the announced statutory purposes, and which requires the Board to achieve and main-

tain "sound economic conditions" in the air transport industry. Thus, Eastern has a property right which, though not exclusive, is protected against excessive competition and competition not found, after hearing, to be required by the public convenience and necessity. In other words, Eastern has a "conditionally exclusive" certificate which cannot be impaired except by following the procedure and standards outlined in the Act. Thus Eastern is not complaining against mere competition, but rather competition in excess of statutory requirements and competition authorized without the hearing and findings required by law, which competition would impair Eastern's conditionally exclusive property right. The decisions cited by the lower court make precisely this distinction. In the *Alabama Power Company* case, the Supreme Court emphasized that the franchises of the power companies were neither conditionally nor absolutely exclusive and that the proposed competition was fully authorized by law, and the Court carefully distinguished the *Frost* case on that ground. The *Tennessee Power Company* case likewise shows that the proposed competition was fully authorized under the statutes involved.

It is not clear why the lower court cited the *Alabama Power Company* and the *Tennessee Power Company* cases, inasmuch as those cases held that the power companies had no *"standing"* to question the acts there complained of, whereas here the lower court conceded (App. A) that Eastern had " 'a substantial interest in such order' within the meaning of the section of the Act that permits judicial review." Any suggestion that competitive impact on a certificated carrier is insufficient to give "standing" for judicial relief would be contrary to all decided cases on the point, including *Pan American Airways* v. *Civil Aeronautics Board,* 121 F. (2d) 810, 813 (C. C. A. 2d, 1941) where the court stated: "Pan American, as the only

American carrier engaged in foreign air transportation, had a substantial interest in the issue of a certificate because it would be adversely affected by the diversion of traffic to a prospective competitor."

It may well be that Eastern's right to judicial review is sufficient alone to establish Eastern's "property right" under the Constitution, as anything short of a property interest could hardly qualify as a "substantial interest" within the meaning of the review provisions of the Act. But, in any event, the foregoing authorities establish that Eastern has a Constitutionally-protected property interest herein, which entitles Eastern to a hearing before such right may be impaired as contemplated by the Board's orders here under consideration.

The lower court's assertion (App. A) that the proceedings before the Board (consisting entirely of disputed *allegations* of the interested parties) were sufficient apparently is predicated on the assumption that *no proceedings* were required. It is inconceivable that an agency may rely on mere *allegations* where they are directly disputed and where, as here, the facts are such as cannot be ascertained fully except through cross-examination of the applicant. Certainly a court would not act on the basis of such self-serving statements by the interested party where counter-allegations have been filed, and it is submitted that the Board cannot do so, particularly since the Board's orders must have sufficient evidentiary basis to be sustained on review by the court.

It is well settled that reliance on such *ex parte* allegations is not in accordance with due process. *Londoner* v. *Denver,* 210 U. S. 373, 386 (1908). And even if *part* of the material facts relied on in issuing an administrative order is presented *ex parte* (*i.e.,* is not subject to cross-examination), the requirements of due process have not been met. *Reilly* v. *Pinkus,* 338 U. S. 269, 275-276 (1949).

It is respectfully submitted that Eastern has a constitutional right to a hearing before the Board in this case, and this Court is urged to require the Board to hold such a hearing.

II.

The Orders of the Board Here Complained of Are Contrary to Law Because They Fail to Set Forth Adequate Findings of Fact and They Are Unsupported by Substantial Evidence.

The foregoing discussion has pointed out that the Board is required to make findings, based on substantial evidence, before granting exemptions under Section 416 (b) of the Act, and that that circumstance establishes the absolute necessity for holding hearings in exemption cases. It is clear that the Board has not made the required findings, and that such findings as have been made are not supported by "substantial evidence."

Section 416 (b) of the Act authorizes the Board to grant an exemption to an air carrier "if it finds that the enforcement of this title * * * would be an undue burden on such air carrier * * * by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier * * * and is not in the public interest." Thus the exemption section itself requires the Board to make findings.

Section 1005 (f) of the Act provides as follows:

> "Every order of the Authority shall set forth the findings of fact upon which it is based."

Section 8 (b) of the Administrative Procedure Act provides that:

> "All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and

include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof."

See also Section 6 (d) of the Administrative Procedure Act.

The foregoing statutory provisions clearly require findings of fact with respect to the granting of Piedmont's request for exemption, and with respect to the Board's order denying Eastern's petition for reconsideration. It is quite clear that the Board did not comply with such statutory provisions in issuing the orders here complained of. As noted above, the Board's original order granting the exemption (R. 28-29) merely recited various representations made by Piedmont without purporting to find whether such representations were true or false, and further recited the fact that Eastern and others had filed objections to the proposed exemption, without even attempting to state what the objections were or whether they were sound or unsound. The Board then proceeded to "find" simply that "the present enforcement of the provisions of Section 401 (a) of the Act, insofar as they prevent the service authorized herein, would be an undue burden on Piedmont by reason of the limited extent of, and the unusual circumstances affecting, its operations, and is not in the public interest."

It will be seen that the Board's only "finding" on that point was stated in almost exactly the same language as the statute, and made no attempt to set forth any of the facts or supposed facts which led to the Board's conclusion.

Numerous decisions of the Supreme Court and other courts establish that such findings are not sufficient. *Florida* v. *United States,* 282 U. S. 194 (1931); *Panama Refining Company* v. *Ryan,* 293 U. S. 388 (1935); *United States* v.

Chicago, M., St. P. & P. R. R., 294 U. S. 499 (1935); *United States* v. *Carolina Carriers Corporation*, 315 U. S. 475 (1942); *Securities & Exchange Commission* v. *Chenery Corporation*, 318 U. S. 80 (1943), 332 U. S. 194 (1947); *Saginaw Broadcasting Company* v. *Federal Communications Commission*, 68 App. D. C. 382, 96 F. (2d) 554 (1938); *Inland Motor Freight* v. *United States*, 60 F. Supp. 520 (E. D. Wash. 1945).

Congress has made it clear that the requirement of findings in the Administrative Procedure Act is not satisfied by a mere recitation of the statutory language. As Congressman Walter, the principal sponsor of the Administrative Procedure Act in the House of Representatives, said (Senate Document 248, p. 367):

> "*The mere parroting of findings or conclusions in the words of statutes, however sufficient that may be as an ultimate conclusion, definitely would not satisfy in any manner the requirements of this section* unless both the statute and the issue were very narrow indeed. Almost any case of consequence involves numerous and detailed issues of law, fact, and discretion. These must all be determined as a part of the decision. Only in that manner are the parties protected and assured that the case has been fully and completely considered and determined" (Italics supplied).

The Senate and House Committee Reports on the Administrative Procedure Act stated (Senate Document 248, pp. 210, 273):

> "The requirement that the agency must state the basis for its findings and conclusions means that such findings and conclusions must be sufficiently related to the record as to advise the parties of their record basis."

The Supreme Court had the following to say in *United States* v. *Carolina Carriers Corporation,* 315 U. S. 475, 489 (1942):

> "Congress has made a grant of rights to carriers such as appellee. Congress has prescribed statutory standards pursuant to which those rights are to be determined. Neither the Court nor the Commission is warranted in departing from those standards because of any doubts which may exist as to the wisdom of following the course which Congress has chosen. Congress has also provided for judicial review as an additional assurance that its policies be executed. That review certainly entails an inquiry as to whether the Commission has employed these statutory standards. If that inquiry is halted at the threshold by reason of the fact that it is impossible to say whether or not those standards have been applied, then the review has indeed become a perfunctory process. If, as seems likely here, an erroneous statutory construction lies hidden in vague findings, then statutory rights will be whittled away. An insistence upon the findings which Congress has made basic and essential to the Commission's action is no intrusion into the administrative domain."

Even if, as the lower court held, there were no requirement of a hearing in exemption proceedings such as this, the Board would not therefore be relieved of its duty to make findings. Not only does the Civil Aeronautics Act *specifically* require findings in exemption cases, but Section 6 (d) of the Administrative Procedure Act—applicable to *all* proceedings, *whether hearings are granted or not*—requires that "Prompt notice shall be given of the denial in whole or in part of any written application, petition, or

other request of any interested person made in connection with any agency proceeding. Except in affirming a prior denial or where the denial is self-explanatory, such notice shall be accompanied by a simple statement of procedural or other grounds."

With respect to Section 6 (d) of the Administrative Procedure Act the Senate and House Committees stated as follows (Senate Document 248, pp. 206, 265-268):

> "This subsection affords the parties in any agency proceeding, whether or not formal or upon hearing, the right to prompt action upon their requests, immediate notice of such action, and a statement of the actual grounds therefor. The latter should in any case be sufficient to apprise the party of the basis of the denial and any other or further administrative remedies or recourse he may have."

It follows that, even if the Board could deny Eastern a hearing with respect to Piedmont's application for exemption, the Board was required—under the Administrative Procedure Act and the Civil Aeronautics Act—to give Eastern a statement which would explain the basis for the Board's action in denying Eastern's objection to the exemption. Plainly the Board's "parroting of * * * conclusions in the words of statutes" was not sufficient.

In its order on reconsideration (R. 49) the Board made a studied effort to supply the findings lacking in its original order. However, it is clear that even such "findings" are not adequate. Presumably because there was no evidence, the Board was forced to make such general observations as (R. 53) that "the exemption *will probably* enable it [Piedmont] to reduce the non-revenue flights which *it claims* its route as certificated has required" (Italics supplied). The Board noted (R. 52) Eastern's contention that the same economies could be achieved without the exemption, but

the Board made no finding with respect to that contention and, of course, the Board therefore could not and did not make a finding that the exemption was needed in order to prevent the "undue burden" alleged by Piedmont. The Board also resorted to the generality that (R. 53) "it is reasonable to conclude" that reduction in Piedmont's service at Danville would enable Piedmont to reduce costs at that station, and that all of the uncertain factors mentioned by the Board "should operate to reduce Piedmont's costs." (It should be noted in passing that the Board made no finding that any reduction in Piedmont's costs at Danville would not be offset by a corresponding *increase* in costs at Winston-Salem.) Plainly such statements are not *findings* that economies *will* result, that such economies can be produced in no other way, or that it would be an undue burden on Piedmont to comply with the certificate requirements of the Act.

The Board has declined (R. 54) to make any finding as to the extent of diversion of connecting traffic from Eastern. The Board has made no attempt to analyze the effect of Piedmont's exemption on the cities involved, or on Eastern's operations between such cities. Plainly the Board could make no proper finding on such matters without the evidence which it declined to receive.

The lower court (App. A) attempts to excuse the Board's failure to make findings by saying that "The statutory words 'if it finds,' in their context, mean little more than 'if it believes.'" That is judicial legislation in its most obvious form. When Congress plainly requires "findings," how can a court say that Congress meant to require only a "belief"? Particularly, how can a court reach such a conclusion when Congress has used the words "if it finds" in Section 416 (b) (1) (the exemption section) and also in other contexts (Sections 401 (d) (1), 401 (k), 408 (b), 412 (b), 416 (b) (2), and 1002 (c)) where genuine findings

(and hearing) clearly are required, and has used the words "whenever the Authority is of the opinion" in other portions of the Act (Sections 1005 (a) and 1002 (a)) where it appears that the Board may lawfully act on the basis of "belief" or "opinion"?

Congress must be presumed to know the difference between a finding and a belief or opinion, and to have made a deliberate choice of words in requiring that the Board make findings before granting exemptions.

As demonstrated above, it is inconceivable that Congress intended to turn over to the Board complete discretion to by-pass the standards and requirements of the Act simply on the basis of a "belief" of the Board that such action is desirable. Such a supposed intention is contrary to the entire pattern and purpose of the Act.

It is obvious that a "belief" of the Board could not be reviewed by a court. If the Board were to act on a "belief," an appellate court would be confronted with the problem stated by Mr. Justice Cardozo in *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292, 302-303 (1937):

> "To put the problem more concretely: how was it possible for the appellate court to review the law and the facts and intelligently decide that the findings of the Commission were supported by the evidence when the evidence that it approved was unknown and unknowable?"

Thus, the existence of the judicial review provision negatives the suggestion that the Board may act on a "belief" unsupported by findings or evidence.

The very importance of the Board's functions conclusively demonstrates that Congress could not have meant to allow the Board to act on mere "belief." Can it be that the Board, acting on a mere "belief," could exempt a car-

rier from the requirement of having a hearing as required by Section 401 and forthwith grant to the carrier a certificate of public convenience and necessity? Could the Board, acting on "belief," exempt a carrier from the requirement of a hearing and forthwith allow it to abandon service without giving interested cities an opportunity to protest? Could the Board, acting on "belief," exempt a carrier from filing tariffs, observing tariffs, filing divisions of rates, giving non-discriminatory service to localities and types of traffic, providing safe and adequate service, providing facilities to carry the mail, seeking approval of merger agreements, acquisitions of control, pooling agreements, etc.? Could the Board, acting on "belief," exempt carriers (and itself) from the provisions of Section 406 of the Act, and set any rate it wished for the carriage of mail without any opportunity for the Post Office Department to be heard on the question?

Could the Board, acting on "belief," exempt a carrier from the necessity of filing an application for overseas or foreign air transportation, forthwith grant to such carrier an exemption the equivalent of a certificate of public convenience and necessity, and thus deprive the President of his power to approve or disapprove the granting or denial of "any certificate authorizing an air carrier to engage in overseas or foreign air transportation" under Section 801 of the Act?

Surely Congress did not mean that the regulatory program could thus be destroyed by Section 416 (b) (1). On the contrary, Congress specifically required that the Board make findings which, in turn, must be based on substantial evidence.

A recent much-publicized proceeding before the Board may serve to illustrate in part the danger inherent in the court's decision. Pan American World Airways, Inc. and American Airlines, Inc. filed an application for approval of

the acquisition by Pan American of American's subsidiary, American Overseas Airlines, Inc. In the same proceeding, the Board considered possible extensions of Pan American and Trans World Airlines, Inc. into new European cities. Because "transfer" and possible "issuance" of "certificates" covering foreign air transportation were involved, the entire matter was subject to ultimate determination by the President under Section 801 of the Act. The route extension proposal was governed by Section 401, and the merger proposal was governed by Section 408. Can it be that the lower court is now ruling that the Board could have exempted Pan American and American from the necessity for having a hearing, and could have granted them a further exemption, without hearing, findings or evidence, authorizing the merger, and could have permitted Pan American and TWA to extend their routes into new territory by exemption (thus avoiding "issuance * * * of * * * any certificate" subject to the President's power)? It should be emphasized that Section 408 (b) specifically prohibits the Board from approving any merger which would result in creating a monopoly. Is it possible that the Board could, by exemption and without hearing—merely on the basis of a "belief"—permit Pan American and American Overseas to merge and operate as a single unit over an extended route even though such action would result in creating a monopoly?

Certainly when Congress entrusted the Board (and the President, in the case of foreign and overseas routes) with complete control of the economic destinies of air carriers and with enforcement of the anti-trust laws in relation to such carriers, it is absurd to suppose that Congress meant the Board to be in a position to act with respect to such important matters simply on the basis of a "belief," and to act, without concurrence of the President, simply by

employing the exemption device rather than the certificate procedure.

Moreover, even if it could be supposed, contrary to the entire pattern and history of the Act, that Congress meant to authorize the Board to exempt, without hearing or findings, from all provisions of Title IV of the Act (except the relatively minor provision relating to pilots), it is apparent that such an authorization of arbitrary action by the Board would be an unconstitutional delegation of legislative power, inasmuch as there would be no standards by which the Board's action could be tested in any judicial proceeding or even in common sense. *Panama Refining Company* v. *Ryan,* 293 U. S. 388 (1935); *Schechter Poultry Corporation* v. *United States,* 295 U. S. 495 (1935). In the *Schechter* case, which was a unanimous decision of the Supreme Court, it was concluded that delegation by Congress of the power to certain trade groups and the President "to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion" of trades and industries was unconstitutional. The Court said (295 U. S. 537): "Such a delegation of legislative power is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress."

The Court specifically stated (295 U. S. 538) that it was an unconstitutional delegation of authority to the President to permit him to act on the basis of "a statement of an *opinion* as to the general effect upon the promotion of trade or industry of a scheme of laws" (Italics supplied). If it was unconstitutional for the President to be allowed to act on the basis of an "opinion," surely it would be equally unconstitutional for the Board to be authorized to act on the basis of a "belief."

The following language of Mr. Justice Cardozo, concurring in the *Schechter* case, is significant (295 U. S. 551):

"This Court has held that the delegation may be unlawful though the act to be performed is definite and single, if the necessity, time, and occasion of performance have been left in the end to the discretion of the delegate. *Panama Refining Co.* v. *Ryan, supra* * * * Here, in the case before us, is an attempted delegation not confined to any single act nor to any class or group of acts identified or described by reference to a standard. Here in effect is a roving commission to inquire into evils and upon discovery correct them."

Obviously the delegation which would result from the lower court's interpretation of the Board's exemption powers would be subject to precisely the same objections outlined by Mr. Justice Cardozo. Here, as there, the proposed delegation leaves to "the discretion of the delegate" the power to decide "the necessity, time and occasion of performance," and it is "not confined to any single act nor to any class or group of acts identified or described by reference to a standard." As the lower court's opinion concedes (App. A) the exemption power relates to "nearly all requirements of the Act." In other words, the exemption authorization described in the lower court's opinion authorizes the Board to do everything related to economic regulation of the air transport industry solely on the basis of the Board's "belief" (with the single exception that in the case of pilots' wages and hours the Board must hold a hearing and comply with the statutory criteria). That "is a roving commission to inquire into evils and upon discovery correct them."

Mr. Justice Cardozo further stated (295 U. S. 553):

"The extension becomes as wide as the field of industrial regulation. If that conception shall prevail, anything that Congress may do within the limits of the

> commerce clause for the betterment of business may be done by the President upon the recommendation of a trade association by calling it a code. This is delegation running riot. No such plenitude of power is susceptible of transfer."

Here, too, if the lower court's interpretation of the Act should prevail, anything which Congress could do in the regulation of air transportation "may be done by the [Board] upon the recommendation of [an interested applicant] by calling it [an exemption]. This is delegation running riot."

If it be suggested that there is no unlimited delegation here in view of the fact that certain standards are prescribed in the Act, the answer is that the lower court's opinion would utterly free the Board from complying with those standards. The statute involved in the *Schechter* case actually prescribed standards. The fatal defect there (as would be true here if the lower court's opinion were to prevail) was that the delegate could act on the basis of a mere "opinion," and there was no way that interested parties or a court could ascertain whether the statutory standards had been observed. It is submitted that there is no Constitutional distinction between a statute which authorizes the Board to do anything which it wishes on the basis of a "belief" and a statute which says: "The Board shall comply with standards a through z, but in its uncontrolled discretion the Board may disregard those standards and act as it wishes on the basis of a 'belief.' "

The lower court's opinion (App. A) actually points up this difficulty with that court's suggested interpretation of Section 416 (b) (1), as the court admits that "A belief arbitrarily held might not be enough and some proceedings may be necessary." How can it possibly be determined whether the belief is "arbitrarily held" unless the Board

is required to make findings and state the evidentiary basis for its "belief"? *Ohio Bell Telephone Co.* v. *Public Utilities Commission, supra.* Certainly the fact that the Board may have had before it some self-serving statements by interested parties, which were not subjected to cross-examination, and were not supported by facts or proof of any kind, does not indicate that the Board's "belief" was not arbitrary. For anything the parties or the court can know, the Board may have completely ignored even the *allegations* which it had before it. But in any case, it is clear that the Board did not consider anything which could be called "evidence," and since the *allegations* were conflicting the Board was forced to make an "arbitrary" choice between believing allegations of Piedmont and accepting the allegations of Eastern. The choice was necessarily "arbitrary" because the Board had no evidence on which to make the decision.

The Court is respectfully urged to find that Congress did not delegate to the Board power to disregard the regulatory pattern established by Title IV of the Act solely on the basis of the Board's "belief" that the statute should be disregarded, as such a delegation would (1) be contrary to the entire pattern and purpose of the Act, and (2) be unconstitutional.

But even if the Board's findings were adequate in themselves, it is clear that they are unsupported by "substantial evidence," and therefore the Board's orders must be set aside by this Court.

Section 1006 (e) of the Act provides that "The findings of facts by the Authority, if supported by substantial evidence, shall be conclusive."

There is *no evidence* of any kind in the record, much less "substantial evidence" supporting the Board's orders.

The record in this case consists entirely of the pleadings of the parties and the Board's orders. The pleadings

contain only allegations—and those allegations are vigorously controverted on both sides. Certainly such *conflicting contentions* could not be deemed "evidence." Likewise, the Board's orders do not purport to set forth facts, and even if they did so, any such facts presented for the first time in the Board's orders could not be considered "evidence."

The Board refused to grant Eastern's request for a hearing in which evidence could be presented. Consequently, there is no evidence.

If it be suggested that the Board might have taken "official notice" of facts within its actual or presumed knowledge, there are at least three obvious answers: (1) The Board did not purport to take official notice of any facts; (2) Eastern does not believe that there are any facts which could be "officially known" by the Board which would be sufficient to support any finding on the matter; and (3) even if the Board's orders could be supported by matters known to the Board, the Board could not lawfully take notice of such matters without giving Eastern an opportunity to prove the contrary.

Section 7 (d) of the Administrative Procedure Act provides that "Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary." With respect to that provision, the Senate and House Committees had the following to say (Senate Document 248, pp. 209, 271-272):

> "The 'official notice' mentioned relates to the administrative practice of taking facts as shown and true though not in the record. This is done by analogy to judicial notice familiar in court procedure. Where agencies take notice they must so state on the record

or in their decisions and then afford the parties an opportunity to show the contrary."

The Board's orders here complained of contain no suggestion that the Board was relying in any way on facts officially noticed. It is clear that if the Board had relied on such material, it was obligated under the law to inform Eastern of the facts so noticed and give Eastern an opportunity to show the contrary. The Board did not do so, although Eastern repeatedly sought a hearing (R. 21, 33, 36, 47) at which any facts or alleged facts could have been explored, and Eastern specifically pointed out (R. 47) that the Board had a duty under the law to notify Eastern of any alleged facts which it intended to notice officially in order that Eastern might have opportunity to refute such evidence.

Moreover, the Board has no power to take official notice of material which is not generally recognized as authoritative. As the House Committee said with respect to Section 7 (d) of the Administrative Procedure Act (Senate Document 248, p. 272): "Such notice may initially be taken only of generally recognized and ordinarily indisputable facts—usually those of a scientific or public nature."

It is clear that nothing which the Board purported to "find" in connection with the exemption order is supported by "generally recognized" or "indisputable" facts, and it is particularly obvious that there are no such facts which the court could judicially notice on appeal which would support the Board's purported "findings." Since the court's examination of the record in this case necessarily will disclose no evidence of any kind, it is clear that the Board's orders are not supported by substantial evidence and should be set aside.

CONCLUSION

In view of the foregoing considerations, it is respectfully requested that this Court grant the writ of certiorari sought in the petition annexed hereto, and that, upon review of the decision of the United States Court of Appeals for the District of Columbia Circuit, said decision be reversed, and the cause remanded for further proceedings consistent with the opinion of the Supreme Court.

Respectfully submitted,

E. SMYTHE GAMBRELL,
Attorney for Petitioner.

E. SMYTHE GAMBRELL,
W. GLEN HARLAN,
HAROLD L. RUSSELL,
CHARLES A. MOYE, JR.,
Atlanta, Georgia,

Of Counsel.

May 2, 1951.

APPENDIX A

United States Court of Appeals

FOR THE

DISTRICT OF COLUMBIA CIRCUIT

No. 10264

EASTERN AIRLINES, INC.,

Petitioner,

—v.—

CIVIL AERONAUTICS BOARD,

Respondent,

CAPITAL AIRLINES, INC.,

Intervenor.

On Petition for Review of Orders of the Civil Aeronautics Board.

Decided October 23, 1950

Messrs. W. Glen Harlan and E. Smythe Gambrell for petitioner. Mr. Llewellyn C. Thomas also entered an appearance for petitioner.

Mr. Willian J. Hickey, Special Assistant to the Attorney General, with whom *Assistant Attorney General Bergson and Messrs. Emory T. Nunneley, Jr.,* General Counsel, and *John H. Wanner,* Associate General Counsel, both of the Civil Aeronautics Board, were on the brief, for respondent.

Messrs. Robert B. Hankins and *Macon M. Arthur* entered appearances for intervenor Capital Airlines, Inc.

Before:

EDGERTON, CLARK and FAHY,
Circuit Judges.

EDGERTON, *Circuit Judge*:

Section 401(a) of the Civil Aeronautics Act, 52 Stat. 987, 49 U. S. C. §481(a), provides that "no air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation* * *" Capital was a certificated air carrier and wished to engage in transportation not covered by its certificate. Section 401(h) of the Act, 52 Stat. 989, 49 U. S. C. §481(h), authorizes the Board "after notice and hearing" to amend a certificate if public convenience and necessity require. But the Act contains an exemption section which does not mention notice or hearing. Section 416(b)(1), 52 Stat. 1005, 49 U. S. C. §496-(b)(1), says the Board "may (except as provided in paragraph (2) of this subsection) exempt from the requirements of this title or any provision thereof * * * any air carrier * * * if it finds that the enforcement of this title or such provision * * * would be an undue burden on such air carrier * * * by reason of the limited extent of, or unusual circumstances affecting, the operation of such air carrier * * * and is not in the public interest."

On July 29, 1948 Capital filed with the Board an application for an order under the paragraph just quoted, §416-(b)(1), exempting Capital from the requirements of the Civil Aeronautics Act in so far as they would, otherwise, prevent Capital from engaging in certain transportation. The application contained various assertions of fact, and conclusions to the effect that the proposed schedules would immediately enable Capital to save over $11,000 per month and would be in the public interest. The application was

verified. On September 27, 1948, after proceedings which we summarize below,[1] the Board, "finding that the present enforcement of the provisions of section 401(a) of the Act insofar as said sections [*sic*] would otherwise prevent applicant from engaging in the air transportation authorized hereby would be an undue burden on applicant by reason of the unusual circumstances affecting its operations and is not in the public interest," issued a temporary order, to expire in one year, exempting Capital from those provisions to that extent and authorizing it to engage in certain transportation not authorized by its certificate. On October 24, 1949 the Board issued a similar order, to expire in six months, on condition that Capital apply within 30 days for amendment of its certificate pursuant to §401(h). On November 23, 1949 Capital did so apply.

On May 12, 1949 Eastern, a certificated air carrier, filed in this court the present petition for review of Capital's exemption order of September 27, 1948. We assume for present purposes that the order subjected Eastern to such additional competition as to give Eastern "a substantial interest in such order" within the meaning of the section of the Act that permits judicial review. §1006(a), 52 Stat. 1024, 49 U. S. C. §646.[2] Since the exemption order, and its successor, have expired by their own terms, we might dismiss the petition for review as moot. But judicial decision of important questions that are likely to recur should not be "defeated by short-term orders, capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 515. *Gay Union Corp.* v. *Wallace*, 71 App. D. C. 382, 112 F. 2d 192, *cert. denied*, 310 U. S. 647. Eastern's petition raises one important and recurring question.

---

1 Note 4.

2 Accordingly we have denied the Board's motion to dismiss the petition for review.

This question is whether exemption proceedings by the Board under §416(b) of the Civil Aeronautics Act must conform to the requirements concerning notice, hearing, etc., that are imposed by §§5, 7, and 8 of the Administrative Procedure Act, 60 Stat. 239, 241, 242, 5 U. S. C. §§1004, 1006, 1007. There is no contention that the Board's proceedings did conform to those requirements.

The Administrative Procedure Act imposes those requirements "In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." (§5) Although §416(b)(1) of the Civil Aeronautics Act does not mention a hearing Eastern contends in effect that, by authorizing the Board to grant exemptions if the Board "finds" certain things, §416(b)(1) impliedly requires "adjudication * * * to be determined on the record after opportunity for an agency hearing." We do not agree with this contention.

In some contexts the word "finds" may imply notice and hearing but its present context precludes that implication. To read such a requirement into §416(b)(1) of the Civil Aeronautics Act would frustrate the action of Congress in permitting the Board to exempt carriers from nearly all requirements of the Act, including the requirement of §401(a) that certificates be obtained and the requirement of §401(h) that they be not amended without notice and hearing. There would be small point in permitting the Board to exempt a carrier from the delay and other burdens of a full hearing under §401(h) and at the same time requiring the Board, before granting the exemption, to hold a similar full hearing under §416(b)(1).[3] The purpose of Congress

[3] As the Seventh Circuit has said in a more or less comparable situation, "We agree with the board that if the test for determining whether an indirect carrier should be relieved of the obligation of proving necessity is to require proof of necessity in every case, it would completely nullify the purpose of Congress as expressed in Section 1(2)." *American Airlines* v. *Civil Aeronautics Board*, 178 F. 2d 903, 906.

in permitting the Board to grant exemptions was to void "undue burden" on carriers. Both that purpose and the fact that the words "notice and hearing," which are used in many Acts of Congress and in some sections of the Civil Aeronautics Act, are omitted from §416(b)(1) indicate that this paragraph does not require a full hearing. We have pointed out that the words "notice and hearing" are used in §401(h), which provides for amending certificates. They are used, also, in the very paragraph that immediately follows paragraph 416(b)(1) and creates an exception to it. Whereas 416(b)(1), without mentioning notice and hearing, authorizes the Board "except as provided in paragraph (2) of this subsection" to grant exemptions from the requirements of the Act "if it finds that" their enforcement would be an undue burden, paragraph (2) forbids the Board to grant exemptions from certain requirements of the Act regarding pilots' hours and pay unless it "finds, after notice and hearing, that" their enforcement would be an undue burden. Congress could hardly have made clearer its intention to authorize the Board to grant, without hearing, exemptions from requirements that do not relate to pilots.

The statutory words "if it finds," in their context, mean little more than "if it believes." A belief arbitrarily held might not be enough and some proceedings may be necessary. In this case there were proceedings, in the course of which several verified documents were filed with the Board.[4]

---

4 On July 29, 1948 Capital filed its verified application for exemption. On August 19, 1948 Eastern filed a motion that the application be dismissed or set for hearing. The motion presented Eastern's views on the law and disputed factual allegations of Capital. On August 31, 1948 Capital filed a verified answer to Eastern's motion, disputing arguments and factual allegations of Eastern. On September 16, 1948 Eastern filed a reply. On September 27 the Board issued its order denying Eastern's motion and granting Capital's exemption. On November 2, 1948 Eastern filed a verified petition for reconsideration and for a stay of the exemption order, advancing new facts and arguments. On November 30, 1948 Eastern filed a verified supplement to that

We do not doubt that these proceedings were all the law requires and more. But that specific question has become moot and we decide only the general question which is likely to recur. In our opinion the Civil Aeronautics Act does not require that exemption applications be adjudicated "after opportunity for an agency hearing."

Even though no Act of Congress requires a hearing, the Administrative Procedure Act must be followed where a hearing is necessary to the protection of constitutional rights. *Wong Yang Sung* v. *McGrath,* 339 U. S. 33. But that rule is not pertinent here. Eastern is complaining of damage by competition which it says was made possible by unauthorized administrative action. The Constitution does not guarantee protection against such damage. *Alabama Power Co.* v. *Ickes,* 302 U. S. 464; *Tennessee Power Co.* v. *Tennessee Valley Authority,* 306 U. S. 118. *Cf. Perkins* v. *Lukens Steel Co.,* 310 U. S. 113; *Chapman* v. *Sheridan-Wyoming Coal Co., Inc.,* 338 U. S. 621.

We conclude that the requirements of §§5, 7, and 8 of the Administrative Procedure Act have no application to exemption proceedings under §416(b)(1) of the Civil Aeronautics Act.

Affirmed.

---

petition with additional facts and arguments. On December 13, 1948 Capital answered Eastern's supplemented petition for reconsideration. On December 22, 1948 Eastern replied to Capital's answer. On March 15, 1949 the Board amended its original order.

APPENDIX B

Applicable Statutory Provisions

CIVIL AERONAUTICS ACT (49 U. S. C. 401 *et seq.*)

Sec. 2

In the exercise and performance of its powers and duties under this Act, the Authority shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics.

Sec. 401 (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Authority authorizing such air carrier to engage in such transportation: *Provided,* That if an air carrier is engaged in such transportation on the date of the enactment of this Act, such air carrier may continue so to engage between the same terminal and intermediate points for one hundred and twenty days after said date, and thereafter until such time as the Authority shall pass upon an application for a certificate for such transportation if within said one hundred and twenty days such air carrier files such application as provided herein.

(b) Application for a certificate shall be made in writing to the Authority and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Authority shall by regulation require.

(c) Upon the filing of any such application, the Authority shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Authority and to such other persons as the Authority may by regulation determine. Any interested person may file with the Authority a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for public hearing, and the Authority shall dispose of such application as speedily as possible.

(d) (1) The Authority shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regula-

tions, and requirements of the Authority hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

(2) In the case of an application for a certificate to engage in temporary air transportation, the Authority may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform to the provisions of this Act and the rules, regulations, and requirements of the Authority hereunder.

* * * * *

(h) The Authority, upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided,* That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Authority, with an order of the Authority commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Authority to have been violated. Any interested person may file with the Authority a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate.

Sec. 416

(b) (1) The Authority, from time to time and to the extent necessary, may * * * exempt from the requirements of this title or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that the enforcement of this title or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest.

Sec. 1006 (a)

Every order of the Authority shall set forth the findings of fact upon which it is based, and shall be served upon the parties to the proceeding and the persons affected by such order.

Sec. 1005 (f)

Any order, affirmative or negative, issued by the Authority under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has

his principal place of business or in the United States Court of Appeals for the District of Columbia.

* * * * *

(e) The findings of facts by the Authority, if supported by substantial evidence, shall be conclusive. No objection to an order of the Authority shall be considered by the court unless such objection shall have been urged before the Authority or, if it was not so urged, unless there were reasonable grounds for failure to do so.

ADMINISTRATIVE PROCEDURE ACT (5 U. S. C. 1001 *et seq.*)

Sec. 2.

As used in this Act—

(d) ORDER AND ADJUDICATION.—"Order" means the whole, or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

(e) LICENSE AND LICENSING.—"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license.

* * * * *

(g) AGENCY PROCEEDING AND ACTION.—"Agency proceeding" means any agency process as defined in subsections (c), (d), and (e) of this section. "Agency action" includes the whole or part of every agency rule,

order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

Sec. 5

In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—

(a) NOTICE.—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(b) PROCEDURE.—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the

extent that the parties are unable so to determine any controversy by consent, hearing and decision upon notice and in conformity with sections 7 and 8.

Sec. 6

Except as otherwise provided in this Act—

* * * * *

(d) DENIALS.—Prompt notice shall be given of the denial in whole or in part of any written application, petition, or other request of any interested person made in connection with any agency proceeding. Except in affirming a prior denial or where the denial is self-explanatory, such notice shall be accompanied by a simple statement of procedural or other grounds.

Sec. 7

In hearings which section 4 or 5 requires to be conducted pursuant to this section—

* * * * *

(c) EVIDENCE.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. * * *

(d) RECORD.—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

Sec. 8

In cases in which a hearing is required to be conducted in conformity with section 7—

* * * * *

(b) SUBMITTALS AND DECISIONS.—* * * All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

Sec. 10

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (in-

cluding action for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

* * * * *

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory

right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
Argument	9
Conclusion	14
Appendix A	15
Appendix B	24

CITATIONS

Cases:

Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 998, et al. v. *Wisconsin Employment Relations Board*, 340 U. S. 416	10
Boise City Irr. and Land Co. v. *Clark*, 131 Fed. 415	13
Civil Aeronautics Board v. *State Airlines, Inc.*, 338 U. S. 572	4
Eastern Airlines, Inc. v. *Civil Aeronautics Board*, No. 567, Oct. Term, 1950	7, 10
Eastern Airlines v. *Civil Aeronautics Board*, 185 F. 2d 426	7, 12
Gay Union Corp. v. *Wallace*, 112 F. 2d 192, certiorari denied, 310 U. S. 647	11
Southern Pacific Terminal Co. v. *Interstate Commerce Commission*, 219 U. S. 498	11, 12
Universal Camera Corp. v. *National Labor Relations Board*, 340 U. S. 474	13

Statutes:

Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001, *et seq.*:	
Sec. 2	23
Sec. 5	2, 23
Sec. 7	2, 24
Sec. 8	2, 24
Sec. 9(b)	9, 10, 24
Civil Aeronautics Act, 52 Stat. 973, as amended, 49 U.S.C. 401, *et seq.*:	
Sec. 2	15
Sec. 401	2, 16
Sec. 401(d)	3
Sec. 416(b)	3, 21
Sec. 1006	22

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 714

EASTERN AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The court below rendered no opinion. The pertinent orders and findings of the Civil Aeronautics Board (R. 27-31, 49-57) have not been reported.

JURISDICTION

The judgment of the court of appeals was entered on March 15, 1951 (R. 58). The petition for a writ of certiorari was filed on May 2, 1951. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether, and to what extent, this proceeding attacking the validity of an exemption order issued by the Civil Aeronautics Board under section 416 (b) (1) of the Civil Aeronautics Act has become moot in view of the expiration of the challenged order by its own terms and the issuance on new findings of a new exemption order conferring like authority.

2. Whether an exemption application under section 416 (b) (1) of the Civil Aeronautics Act is required to be determined "after opportunity for an agency hearing" so as to make applicable the requirements of sections 5, 7, and 8 of the Administrative Procedure Act.

3. Whether petitioner has a constitutional right to a hearing on an application for exemption which results in the grant of additional operating rights to its competitor.

STATUTES INVOLVED

The pertinent provisions of the Civil Aeronautics Act (52 Stat. 973), as amended (49 U.S.C. 401 *et seq.*), and of the Administrative Procedure Act (60 Stat. 237, 5 U.S.C. 1001 *et seq.*) are set forth in Appendix A, *infra*, pp. 15-24.

STATEMENT

Section 401 of the Civil Aeronautics Act (hereinafter referred to as the Act) prohibits an air

carrier from engaging in air transportation unless it has been issued a certificate by the Civil Aeronautics Board authorizing it to do so. Provision is made for the filing of an application for such authority, the conduct of a public hearing on the application, and the issuance of a certificate by the Board if it finds that the applicant is "fit, willing, and able" and that the transportation is "required by the public convenience and necessity" (Sec. 401(d), *infra,* p. 17). However, section 416 (b) (1) of the Act authorizes the Board to exempt an air carrier from the requirements of many provisions of the Act, including those of section 401, if it finds that the enforcement of such provision is or would be "an undue burden on such air carrier * * * by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier * * * and is not in the public interest" (*infra,* p. 21). Unlike section 401, section 416 (b) (1) makes no reference to the conduct of a hearing.

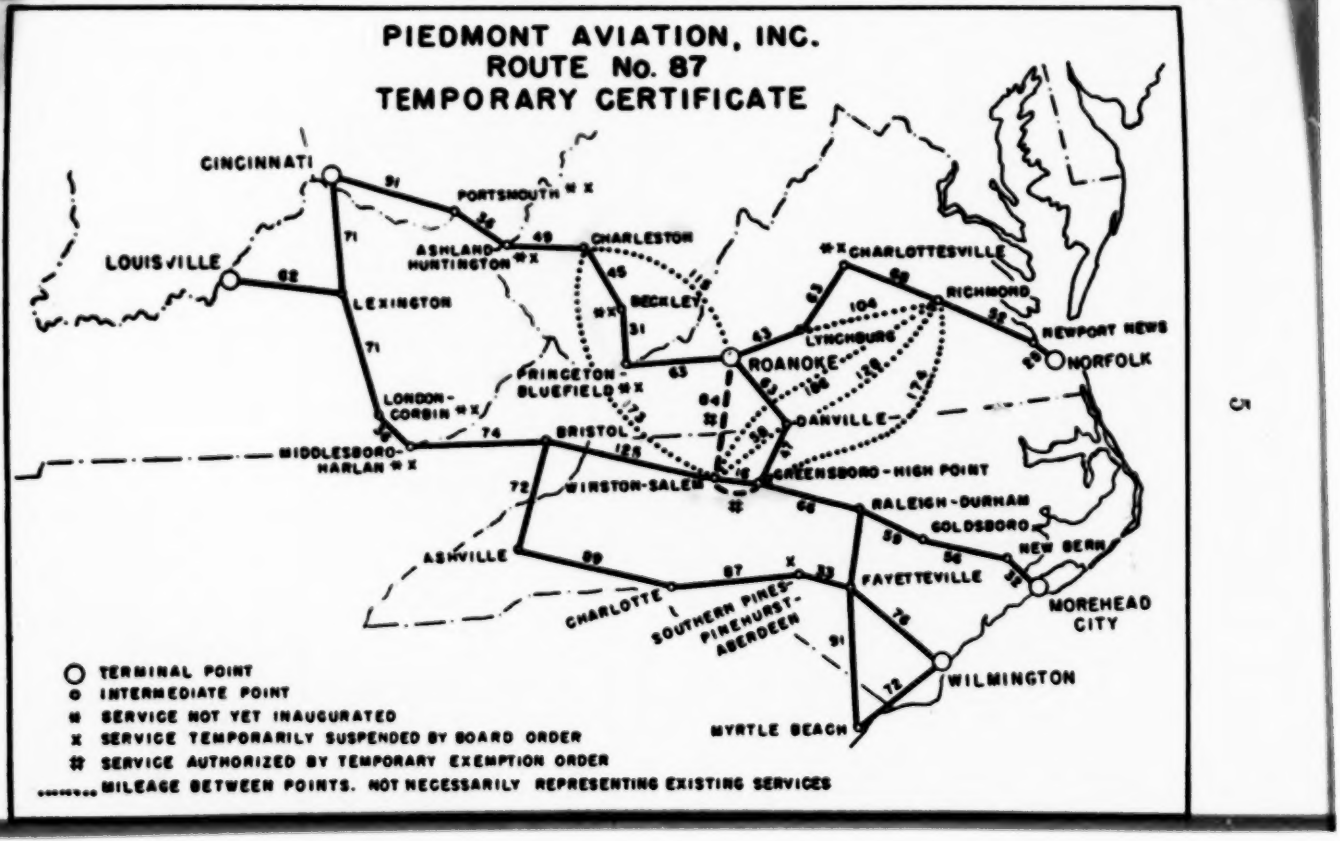
At the time this proceeding commenced, Piedmont Aviation Inc. (Piedmont) held a temporary certificate of public convenience and necessity, expiring December 12, 1950, authorizing it, *inter alia,* to engage in air transportation "between the terminal point Roanoke, Va., the intermediate points Danville, Va., Greensboro-High Point, N. C., Raleigh-Durham, N. C., and Fayetteville, N. C., and the terminal point Wilmington, N. C." (R. 28;

see map facing this page).[1] Piedmont was also authorized to serve Winston-Salem, North Carolina, where its main maintenance base was located (R. 18), on another segment of its route, but it could not render service directly (*i.e.*, non-stop) between Winston-Salem and Roanoke (R. 27-28; see map).

On September 8, 1949, Piedmont filed with the Board a verified application for exemption pursuant to section 416 (b) of the Act which, if granted, would permit it to route one of the two daily round trips it was operating between Greensboro-High Point and Roanoke, through Winston-Salem, instead of routing them both through Danville (R. 16-17). In support of its application, Piedmont alleged that the authority sought would permit it to render better service to the public and to achieve substantial operating economies (R. 17-19). On September 22, 1949, petitioner, which was authorized by its certificate to render service directly between Winston-Salem and Roanoke, requested the Board to deny immediately Piedmont's application or to set it down for public hearing (R. 20-21). On October 25 Piedmont filed a letter with the Board supplementing its application (R. 23-25), to which petitioner replied on November 3 (R. 25-27).

---

[1] This Court reviewed and sustained the Board's order awarding a temporary certificate to Piedmont in *Civil Aeronautics Board* v. *State Airlines, Inc.*, 338 U.S. 572.



THIS PAGE BOUND VERTICAL IN BOOK

On December 1, 1949, the Board entered an order granting Piedmont an exemption from the provisions of section 401 (a) of the Act "insofar as such provisions would otherwise prevent Piedmont from serving Winston-Salem, N. C., as an alternate intermediate point to Danville, Va., on one daily round trip flight over segment 3 of its route No. 87" (R. 30). The Board predicated its order upon findings (1) that the exemption would "permit Piedmont to achieve economies in its operation and enable it to afford better service to the public"; (2) that it would "have no substantial adverse effect upon any other certificated carrier"; and (3) that enforcement of the provisions of Section 401 (a) of the Act "would be an undue burden on Piedmont by reason of the limited extent of, and the unusual circumstances affecting, its operations, and is not in the public interest" (R. 29-30). The order provided that "the exemption granted herein shall terminate December 12, 1950" (R. 30), which was the date Piedmont's certificate expired.

On January 3, 1950, petitioner filed with the Board a petition for hearing, argument, and reconsideration with respect to the Board's exemption order (R. 31-39). On February 1, Piedmont filed a reply and also a motion to strike the petition for reconsideration (R. 40-45). Petitioner answered by letter dated February 4 (R. 45-48). On April 5, 1950, the Board entered an order denying the petition for hearing, argument, and recon-

sideration (R. 49). The order set forth in some detail the findings and reasons upon which it was based (R. 49-57).

Petitioner sought judicial review of the order granting exemption and the order denying reconsideration by a petition for review dated June 1, 1950 (R. 1-15). On March 15, 1951, the court of appeals entered its judgment and decree affirming the orders of the Board, citing in support of its action *Eastern Airlines* v. *Civil Aeronautics Board,* 185 F. 2d 426 (C.A.D.C.)[2] (R. 58-59).

A proper understanding of the current status of the instant proceeding requires brief reference to two other applications filed with the Board by Piedmont and two other orders entered by the Board, none of which is included in the record of this proceeding (cf. Pet. 7-8). As petitioner has indicated, both Piedmont's temporary certificate and its exemption order provided that they would terminate on December 12, 1950. Many months prior to the termination of the temporary certificate, Piedmont filed an application for its renewal (Docket 3727). Further, on November 27, 1950, in accordance with its established practice, the Board instituted a proceeding (Docket 4762) in

[2] The decision referred to was before the Court in *Eastern Airlines, Inc.* v. *Civil Aeronautics Board,* No. 567, this Term. On April 9, 1951, this Court entered a *per curiam* order in the matter as follows: "The petition for writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to that Court with directions to dismiss the proceeding upon the ground that the cause is moot."

which renewal of Piedmont's certificate with certain modifications (including certification of the authority covered by the exemption order here challenged) was proposed. As petitioner states, that proceeding "is now in the very early stages" (Pet. 8); it probably cannot be concluded within a year.

In addition to its application for the renewal of its certificate, Piedmont filed on December 7, 1950, prior to termination of its exemption authority, an application for an extension of its exemption order or for a new exemption order, to be effective until disposition of the certificate renewal proceeding (Docket 4085). Although the petition for certiorari makes no reference to this application, petitioner filed an objection to the application on December 12, 1950, and, after Piedmont replied thereto on December 26, a further objection on January 8, 1951. Upon consideration of Piedmont's application and supporting papers and petitioner's objections, the Board, without holding a hearing, adopted an order (Order Serial No. E-5365) on May 9, 1951, setting forth its findings and granting Piedmont a new exemption identical to that challenged in this proceeding. The order provides for the continuance of the exemption during the pendency of the Piedmont certificate renewal proceeding. For the convenience of the Court the Board's order is reproduced in Appendix B, *infra,* pp. 24-29.

ARGUMENT

1. Petitioner urges that, pursuant to the third sentence of section 9 (b) of the Administrative Procedure Act,[3] the authority conferred upon Piedmont by the exemption order which is the subject of this proceeding has been and will be continued in effect as a matter of law until final disposition of the proceeding with respect to the renewal of Piedmont's temporary certificate. Since the conclusion of the latter proceeding can be expected to require more time than the review which might be accorded by this Court, petitioner asserts that the proceeding is not now moot and will not become moot before this Court has completed its review (Pet. 2, 7-8).

It is true that Piedmont filed a timely and sufficient application for renewal of its certificate and that in accordance with section 9 (b) of the Administrative Procedure Act the authority conferred by such certificate continues until disposition of such application. It does not follow, however, that the separate authority conferred by Piedmont's exemption order was continued in effect until disposition of such certificate application. The exemption order expired by its own terms on December 12, 1950. Piedmont filed an application for its

[3] 60 Stat. 242, 5 U.S.C. 1008(b). "In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency."

extension or renewal on December 7, 1950. Assuming, *arguendo*, that this application was timely and sufficient, and that section 9 (b) applies to the renewal of an exemption from licensing requirements such as is involved here, the extension of such authority pursuant to section 9 (b) nevertheless continues only until disposition of the application for extension or renewal of the exemption. Piedmont's new application for exemption having been disposed of by the Board's order of May 9, 1951, granting Piedmont a new exemption, it is clear that the original exemption order, even if assumed to have been extended by section 9 (b), terminated on May 9, 1951, when the new exemption became effective. Petitioner's suggestion that Piedmont's exemption authority is continued by operation of law until disposition of the certificate renewal proceeding finds no basis in reason or in the language of section 9 (b).

At the present time, therefore, the orders challenged by petitioner in this proceeding are no longer effective and there is no subject matter upon which the judgment of the Court can operate. *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 998, et al.* v. *Wisconsin Employment Relations Board*, 340 U.S. 416, and cases cited therein (at p. 418). However, the situation differs from that presented in *Eastern Airlines* v. *Civil Aeronautics Board*, No. 567, this Term, which this Court

held to be moot. In that case, not only had the challenged orders expired, but the Board had issued an amended certificate embodying the authority previously granted by exemption so that, as a practical matter, renewal of the challenged exemption was precluded. In the present case, no such certificate amendment has been made, and it is extremely unlikely that any such amendment can be made within the coming year. Moreover, until the proceeding for the renewal and amendment of Piedmont's certificate has been completed, Piedmont is authorized by the later exemption order, entered without hearing, to exercise the same authority that it possessed under the exemption order which is challenged here.

In *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U.S. 498, this Court held that the expiration of the order of the Commission there appealed from did not render the case moot, stating: "The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review, and at one time the Government and at another time the carriers have their rights determined by the Commission without a chance of redress" (219 U.S. at p. 515). See also *Gay Union Corp.* v. *Wallace,*

112 F. 2d 192, 195 (C.A.D.C.), certiorari denied, 310 U. S. 647.

Only one of the two issues raised by petitioner falls within the *Southern Pacific Terminal* rule. The two issues are: (1) whether the challenged orders of the Board set forth adequate findings of fact which are supported by substantial evidence (Pet. 51-65); and (2) whether the Board may grant an air carrier new route authority by an exemption order issued under section 416 (b) of the Civil Aeronautics Act without affording a competing carrier an opportunity for a formal hearing (Pet. 24-51). We think it is abundantly clear that the first issue is moot and not open to consideration under the doctrine of the *Southern Pacific Terminal* case. The adequacy of the findings supporting the expired order and the substantiality of the evidence supporting the findings do not present questions of general importance or of a recurring nature. The findings and evidence supporting the exemption order now in effect differ from the findings and evidence supporting the expired order, and a judicial determination with respect to the old order will have no effect upon the rights of the parties under the exemption order now in effect. The second issue (relating to hearing), however, does present an "important and recurring question" (*Eastern Air Lines, Inc.* v. *Civil Aeronautics Board,* 185 F. 2d 426, 427) and thus appears to be within the ambit of judicial power under the *Southern Pacific Termi-*

nal case, *supra.* And see *Boise City Irr. and Land Co.* v. *Clark,* 131 Fed. 415, 419 (C.A. 9).

2. Although the issue with respect to the necessity for a hearing before the Board in this proceeding may be considered by the Court, we submit that the decision below is plainly correct and further review is not warranted. The opinion of the court of appeals in the prior *Eastern Air Lines* case (before this Court in No. 567), which the court of appeals relied upon in the present case, demonstrates conclusively that the Board is not required to hold a hearing before issuing an exemption order under section 416 (b) of the Act. Petitioner concedes that, apart from the question of mootness, "this case presents substantially the same legal issues as" did No. 567 (Pet. 2), and the arguments advanced by petitioner here are the same as those advanced in No. 567 with a single unimportant exception.[4] Those arguments were fully discussed

---

[4] The only new arguments advanced in this case are predicated on the opinion of this Court in *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474. Petitioner asserts (Pet. 16-17, 34-35, 44) that the decision below conflicts with the decision in the *Universal Camera* case because the lower court failed to assume the "responsibility" for the Board's determination contemplated by this Court's opinion, that the lower court could not assume such responsibility because there was no "hearing," no "whole record," and no "examiner's report," and that the decision in the *Universal Camera* case requires a hearing in this case. Patently, the scope and character of judicial review contemplated by the Administrative Procedure Act, as expounded in the *Universal Camera* case, sheds no revealing light on whether Congress provided in section 416 (b) of the Civil Aeronautics Act that the Board should hold hearings before issuing exemption orders.

in the Brief In Opposition in No. 567 (pp. 11-22), to which we respectfully refer the Court. Moreover, it should be noted that in the pending proceeding to determine whether Piedmont's certificate should be renewed, as in No. 567, the Board will determine, after a full hearing, whether Piedmont's certificate if renewed should contain the additional operating authority to which the petitioner objects.

CONCLUSION

One of the questions presented is moot, the decision below is correct with respect to the other question presented, and there is no conflict of authority. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

H. G. MORISON,
Assistant Attorney General.

EMORY T. NUNNELEY, JR.,
General Counsel.

JOHN H. WANNER,
Associate General Counsel.

WARREN L. SHARFMAN,
Attorney,
Civil Aeronautics Board.

MAY 1951.

APPENDIX A

The pertinent provisions of the Civil Aeronautics Act of 1938, as amended,[5] are as follows:

DECLARATION OF POLICY

SEC. 2. [49 U. S. C. 402] In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity;

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to

[5] Act of June 23, 1938, 52 Stat. 973, 49 U. S. C. 401 *et seq.*, Reorg. Plan No. IV, Sec. 7, effective June 30, 1940, 5 F. R. 2421, 54 Stat. 1235, 49 U. S. C. 401 *et seq.*

the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics.

* * * * *

CERTIFICATE REQUIRED

SEC. 401. [49 U. S. C. 481] (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation: *Provided,* That if an air carrier is engaged in such transportation on the date of the enactment of this Act, such air carrier may continue so to engage between the same terminal and intermediate points for one hundred and twenty days after said date, and thereafter until such time as the Board shall pass upon an application for a certificate for such transportation if within said one hundred and twenty days such air carrier files such application as provided herein.

APPLICATION FOR CERTIFICATE

(b) Application for certificate shall be made in writing to the Board and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Board shall by regulation require.

NOTICE OF APPLICATION

(c) Upon the filing of any such application, the Board shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Board and to such other persons as the Board may by regulation determine. Any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for public hearing, and the Board shall dispose of such application as speedily as possible.

ISSUANCE OF CERTIFICATE

(d)(1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

(2) In the case of an application for a certificate to engage in temporary air transportation, the Board may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform

to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder.

EXISTING AIR CARRIERS

(e) (1) If any applicant who makes application for a certificate within one hundred and twenty days after the date of enactment of this Act shall show that, from May 14, 1938, until the effective date of this section, it, or its predecessor in interest, was an air carrier, continuously operating as such (except as to interruptions of service over which the applicant or its predecessor in interest had no control), the Board upon proof of such fact only, shall, unless the service rendered by such applicant for such period was inadequate and inefficient, issue a certificate or certificates, authorizing such applicant to engage in air transportation (A) with respect to all classes of traffic for which authorization is sought, except mail, between the terminal and intermediate points between which it, or its predecessor, so continuously operated between May 18, 1938, and the effective date of this section, and (B) with respect to mail and all other classes of traffic for which authorization is sought, between the terminal and intermediate points between which the applicant or its predecessor was authorized by the Postmaster General prior to the effective date of this section, to engage in the transportation of mail: *Provided,* That no applicant holding an air-mail contract shall receive a certificate authorizing it to serve any point not named in

such contract as awarded to it and not served by it prior to April 1, 1938, if any other air carrier competitively serving the same point under authority of a contract as awarded to such air carrier shall prove that it is adversely affected thereby, and if the Board shall also find that transportation by the applicant to and from such point is not required by the public convenience and necessity.

(2) If paragraph (1) of this subsection does not authorize the issuance of a certificate authorizing the transportation of mail between each of the points between which air-mail service was provided for by the Act of Congress making appropriations for the Treasury Department and the Post Office Department, approved March 28, 1938, the Board shall, notwithstanding any other provision of this Act, issue certificates authorizing the transportation of mail, and all other classes of traffic for which authorization is sought, between such points, namely, (A) from Wichita, Kansas, to Pueblo, Colorado, via intermediate cities; (B) from Bismarck, North Dakota, to Minot, North Dakota; (C) from Detroit, Michigan, to Sault Sainte Marie, Michigan, via intermediate cities; (D) from Brownsville, Texas, via Corpus Christi, to Houston to San Antonio, Texas; (E) from Phoenix, Arizona, to Las Vegas, Nevada, via intermediate cities; (F) from Jacksonville, Florida, to New Orleans, Louisiana, via intermediate cities; (G) from Tampa, Florida, to Memphis, Tennessee, via intermediate cities, and from Tampa, Flor-

ida, to Atlanta, Georgia, via intermediate cities (which projects have been advertised); and (H) by extension from Yakima, Washington, to Portland, Oregon; and (I) by extension from Grand Rapids, Michigan, to Chicago, Illinois.

* * * * *

AUTHORITY TO MODIFY, SUSPEND, OR REVOKE

(h) The Board, upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided,* That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provisions, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate.

* * * * *

CLASSIFICATION

SEC. 416. [49 U. S. C. 496] (a) The Board may from time to time establish such just and reasonable classifications or groups of air carriers for the purposes of this title as the nature of the services performed by such air carriers shall require; and such just and reasonable rules, and regulations, pursuant to and consistent with the provisions of this title, to be observed by each such class or group, as the Board finds necessary in the public interest.

EXEMPTIONS

(b) (1). The Board, from time to time and to the extent necessary, may (except as provided in paragraph (2) of this subsection) exempt from the requirements of this title or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that the enforcement of this title or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest.

(2) The Board shall not exempt any air carrier from any provision of subsection (1) of section 401 of this title, except that (A) any air carrier not engaged in scheduled air transportation, and (B), to the extent that the operations of such air carrier are conducted

during daylight hours, any air carrier engaged in scheduled air transportation, may be exempted from the provisions of paragraphs (1) and (2) of such subsection if the Board finds, after notice and hearing, that, by reason of the limited extent of, or unusual circumstances affecting, the operations of any such air carrier, the enforcement of such paragraphs is or would be such an undue burden on such air carrier as to obstruct its development and prevent it from beginning or continuing operations, and that the exemption of such air carrier from such paragraphs would not adversely affect the public interest: *Provided,* That nothing in this subsection shall be deemed to authorize the Board to exempt any air carrier from any requirement of this title, or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder which provides for maximum flying hours for pilots or copilots.

* * * * *

ORDERS OF BOARD SUBJECT TO REVIEW

SEC. 1006. [49 U. S. C. 656] (a) Any order, affirmative or negative, issued by the Board under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by

any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

The pertinent provisions of the Administrative Procedure Act[6] are as follows:

Sec. 2. As used in this Act—

* * * * *

(d) ORDER AND ADJUDICATION.—"Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

(e) LICENSE AND LICENSING.—"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license.

Sec. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; * * *

(a) NOTICE. — * * *

(b) PROCEDURE. — * * *

[6] Act of June 11, 1946, 60 Stat. 237, 5 U.S.C. 1001 *et seq.*

(c) SEPARATION OF FUNCTIONS. — * * *

(d) DECLARATORY ORDERS. — * * *

Sec. 7. In hearings which section 4 or 5 requires to be conducted pursuant to this section—

(a) PRESIDING OFFICERS. — * * *

(b) HEARING POWERS. — * * *

(c) EVIDENCE. — * * *

(d) RECORD. — * * *

Sec. 8. In cases in which a hearing is required to be conducted in conformity with section 7—

(a) ACTION BY SUBORDINATES. — * * *

(b) SUBMITTALS AND DECISIONS. — * * *

Sec. 9. In the exercise of any power or authority — * * *

(b) LICENSES. — * * * In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency.

APPENDIX B

Orders Serial Number E-5365.

UNITED STATES OF AMERICA CIVIL AERONAUTICS BOARD

Washington, D. C.

Adopted by the Civil Aeronautics Board at its office in Washington, D. C., on the 9th day of May, 1951.

Docket No. 4085

In the matter of the application of PIEDMONT AVIATION, INC. for exemption from the requirements of the Civil Aeronautics Act of 1938, as amended.

ORDER GRANTING EXEMPTION

Piedmont Aviation, Inc. (Piedmont), is the holder of a temporary certificate of public convenience and necessity for route No. 87, authorizing it, *inter alia,* to engage in air transportation of persons, property, and mail over various segments. Although said certificate contains a provision for termination thereof on December 12, 1950, Piedmont filed on April 11, 1947, as amended January 23, 1951, an application with the Board, Docket No. 3727, requesting, *inter alia,* an extension of its existing certificate; and pending the Board's final determination of said application, Piedmont's aforementioned certificate has continued in effect, by operation of law.

The Board by Order Serial No. E-3635, dated December 1, 1949, granted Piedmont a temporary exemption until December 12, 1950, from the provisions of section 401(a) of the Act insofar as such provisions would otherwise prevent Piedmont from serving Winston-Salem, N. C., as an alternate intermediate point to Danville Va., on one daily round trip flight over segment 3 of its route No. 87; *Provided,* That Piedmont shall serve Danville on at least one daily round trip flight.

Piedmont filed with the Board on December 7, 1950, an application for an extension of the aforesaid exemption until such time as the Board shall

have reached a final determination in the *Piedmont Certificate Renewal Case,* Docket No. 4762, or in the alternative, an exemption order granting such authority until the Board's final determination of the aforesaid renewal case.

The Board by its Opinion and Order to Show Cause, Order Serial No. E-4876 dated November 27, 1950, provided, *inter alia,* that Piedmont show cause why the Board should not order the alteration, amendment, or modification of its temporary certificate of public convenience and necessity for route No. 87, so as to renew said certificate and so as to include Winston-Salem, N. C., as an alternate intermediate point to the intermediate point Danville, Va., on segment 3.

Piedmont represents in support of its application for the aforementioned exemption, *inter alia,* that in view of the findings heretofore made in Order Serial No. E-3635 with respect to said exemption, and the pendency of a proceeding for the renewal of Piedmont's certificate, it would be an undue burden on Piedmont to require enforcement of the Act, with respect to serving Winston-Salem as an alternate intermediate point to Danville.

Eastern Air Lines, Inc. (Eastern), filed with the Board on December 11 and 12, 1950, requests that Piedmont's application for extension of its exemption be denied.

Piedmont filed with the Board on December 26, 1950, a reply to Eastern's aforesaid request; and Eastern filed with the Board on January 8, 1951, an answer to said reply.

The Board, upon consideration of the aforementioned application herein, the documents filed in support thereof, and the opposition thereto, acting pursuant to the authority vested by the Civil Aeronautics Act of 1938, as amended, particularly section 416(b) thereof, finds:

1. That the circumstances set forth in Order Serial No. E-3635, dated December 1, 1949, as affirmed on reconsideration by Order Serial No. E-4041, dated April 5, 1950, which warranted the granting of a temporary exemption to Piedmont, remain substantially unchanged;

2. That the results of Piedmont's operations under the previous exemption order show that (1) the exemption has permitted Piedmont to achieve substantial operating economies, (2) the exemption has permitted Piedmont to generate more traffic than it otherwise would have been able to generate; and (3) the exemption has not reduced service to Danville below the amount which is needed;

3. That the Board, by its Order to Show Cause, in the *Piedmont Renewal Case,* Docket No. 4762, proposes, *inter alia,* the amendment of Piedmont's said certificate so as to provide the authority herein granted by exemption;

4. That Piedmont's existing certificate continues in effect by operation of law pending the Board's final decision in the aforesaid renewal proceeding, as consolidated; and that said proceeding will be set for hearing at an early date;

5. That, as indicated by the Board's Airline Traffic Survey for representative past months both before and after the grant of the earlier exemption

to Piedmont (March 1949, September 1949, and March 1950) and the Form 41 reports of Piedmont and Eastern for the year 1949 and the first three quarters of 1950, the exemption granted herein will have no substantial adverse effect upon Eastern or any other certificated air carrier;

6. That Eastern has not set forth matters warranting the denial of Piedmont's application herein; and

7. That in view of the foregoing considerations and the limited duration of the effectiveness of Piedmont's existing certificate of public convenience and necessity for route No. 87, the present enforcement of the provisions of section 401(a) of the Act, and the provisions of Piedmont's amended temporary certificate of public convenience and necessity for route No. 87, insofar as they would prevent the service authorized herein, would be an undue burden on Piedmont by reason of the limited extent of, and the unusual circumstances affecting its operations, and is not in the public interest.

IT IS ORDERED:

1. That Piedmont be and hereby is exempted from the provisions of section 401(a) of the Civil Aeronautics Act of 1938, as amended, and the provisions of its amended temporary certificate for route No. 87, insofar as such provisions would otherwise prevent Piedmont from serving Winston-Salem, N. C., as an alternate intermediate point to Danville, Va., on one daily round trip flight over segment 3 of its route No. 87; *Provided,* That Piedmont shall serve Danville on at least one daily round-trip flight;

2. That the aforementioned requests of Eastern be and hereby are denied;

3. That the exemption granted herein shall terminate 60 days after the Board's final decision in the *Piedmont Certificate Renewal Case,* Docket No. 4762;

4. That Piedmont's application herein, except to the extent granted, be and hereby is denied; and

5. That this order may be amended or revoked at any time in the discretion of the Board without hearing.

By the Civil Aeronautics Board:

[S.] M. C. MULLIGAN,
Secretary.

[SEAL]

☆ U. S. GOVERNMENT PRINTING OFFICE: 1951 946717 859

Office-Supreme Court, U.
FILED
MAY 28 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1950

EASTERN AIR LINES, INC., *Petitioner,* —v.— CIVIL AERONAUTICS BOARD, *Respondent.*	No. 714

REPLY BRIEF OF EASTERN AIR LINES, INC., PETITIONER

E. SMYTHE GAMBRELL,
W. GLEN HARLAN,
HAROLD L. RUSSELL,
CHARLES A. MOYE, JR.,
825 Citizens & Southern
National Bank Building
Atlanta 3, Georgia

Attorneys for Eastern Air Lines, Inc.

GAMBRELL, HARLAN & BARWICK,
825 Citizens & Southern
National Bank Building,
Atlanta 3, Georgia,

Of Counsel.

May 29, 1951

TABLE OF CONTENTS

PAGE

A. The Decision of This Court in Riss & Co. v. United States, 71 Sup. Ct. 620 (U. S. 1951) Requires Reversal of the Decision of the Court of Appeals 2

B. Miscellaneous Points Raised in the Board's Brief Are Invalid 4

C. The Case Is Not Moot 6

CONCLUSION 13

TABLE OF AUTHORITIES

Cases:

Amalgamated Association v. Wisconsin Employment Relations Board, 340 U. S. 416 (1951) 6

Boise City Irr. & Land Co. v. Clark, 131 Fed. 415 (C. C. A. 9th, 1904) 10

Currin v. Wallace, 306 U. S. 1 (1939) 5

Eastern Air Lines, Inc. v. Civil Aeronautics Board, No. 567 (April 9, 1951) 4, 6

Federal Trade Commission v. Goodyear Co., 304 U. S. 257 (1938) 10

Ford Motor Co. v. United States, 335 U. S. 303 (1948) 10

Frost v. Corporation Commission, 278 U. S. 515 (1929) 5

Gay Union Corp. v. Wallace, 71 App. D. C. 382, 112 F. (2d) 192 (1940), cert. denied, 310 U. S. 647 (1940) 10

Howard v. Wilbur, 166 F. (2d) 884 (C. C. A. 6th, 1948) 10

Leonard & Leonard v. Earle, 279 U. S. 392 (1929) 9

PAGE

McGrain v. Daugherty, 273 U. S. 135 (1927) 9

Newport News Co. v. Schauffler, 303 U. S. 54 (1938) 9

Papaliolios v. Durning, 175 F. (2d) 73 (C. C. A. 2d, 1949) 10

Re Large Irregular Carriers, Exemption Applications, Order E-4240 et al., May 25, 1950 11

Riss & Co. v. United States, 71 Sup. Ct. 620 (U. S. 1951) 2, 3

Southern Pacific Co. v. Interstate Comm. Comm., 219 U. S. 433 (1911) 9

Southern Pacific Terminal Company v. Interstate Commerce Commission, 219 U. S. 498 (1911) 1, 6, 7, 12

United States v. Freight Ass'n, 166 U. S. 290 (1897) 9

United States v. Railway Employes' Dept., 286 Fed. 228 (N. D. Ill. 1923) 10

United States v. Workingmen's Amalgamated Council, 54 Fed. 994 (C. C. E. D. La., 1893), aff'd 57 Fed. 85 (C. C. A. 5th, 1893) 10

Walling v. Haile Gold Mines, 136 F. (2d) 102 (C. C. A. 4th, 1943) 10

Walling v. Mutual Wholesale Food & Supply Co., 141 F. (2d) 331 (C. C. A. 8th, 1944) 10

Wong Yang Sung v. McGrath, 339 U. S. 33 (1950) 2, 3

Statutes:

Administrative Procedure Act 2, 3, 4, 6, 7

Civil Aeronautics Act 4, 10

IN THE

Supreme Court of the United States

October Term, 1950

EASTERN AIR LINES, INC., *Petitioner,* —v.— CIVIL AERONAUTICS BOARD, *Respondent.*	No. 714

REPLY BRIEF OF EASTERN AIR LINES, INC., PETITIONER

The brief filed by the Respondent, Civil Aeronautics Board, sets forth little which has not already been adequately answered in Eastern's petition and brief in support of the petition.

The Board's brief raises one point not discussed fully in Eastern's original brief—the Board's rather indefinite suggestion that the case may be moot, at least in part. Eastern did not anticipate that such a suggestion would be made in view of the fact that the exemption authority involved in this case was and is in effect and is certain to remain in effect until long after this Court's ruling on the matter.

Indeed, the Board concedes (its brief, pp. 12-13) that this case is not moot if *Southern Pacific Terminal Company* v. *Interstate Commerce Commission,* 219 U. S. 498 (1911) and the many decisions which have followed it still represent the law. As will be demonstrated hereinafter, those decisions set forth the correct rule of law applicable to this case, and this case is not moot.

Other arguments made by the Board will be discussed preliminarily.

A. *The Decision of This Court in Riss & Co. v. United States, 71 Sup. Ct. 620 (U. S. 1951) Requires Reversal of the Decision of the Court of Appeals.*

The primary question in this case is whether a hearing is required prior to action on an exemption application involving new route authority where the applicable statutory provisions do not specifically mention a hearing requirement but do specify that the Board must make "findings" before acting.

Substantially the same question was before this Court in *Riss & Co.* v. *United States,* 71 Sup. Ct. 620 (U. S. 1951). As appears from the decision of the three-judge District Court in that case (96 F. Supp. 452, 454 (W. D. Mo. 1950)), the statutory provision there involved was Section 207 (a) of the Interstate Commerce Act (49 U. S. C. Section 307 (a)) which authorizes the Interstate Commerce Commission to issue a certificate of public convenience and necessity to any qualified motor carrier "if it is found that the applicant is fit, willing and able to properly perform the service proposed * * * and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity." It will be noted that, just as in this case, the statute involved in the *Riss & Co.* case required the administrative agency to make findings, but did not specifically require a hearing.

The lower court in the *Riss & Co.* case decided that the absence of a specific requirement of a hearing called for the conclusion that adjudication of applications for motor carrier certificates of public convenience and necessity need not "be determined on the record after opportunity for an agency hearing" within the meaning of Section 5 of the Administrative Procedure Act. The lower court distinguished *Wong Yang Sung* v. *McGrath,* 339 U. S. 33 (1950) on the ground that there was no constitutional or "due process" requirement of a hearing on an application for a certificate. Many of the contentions made by the

Board in its brief in this case were presented to the lower court in the *Riss & Co.* case, and were adopted by it.

In a *per curiam* order on April 16, 1951, the Supreme Court reversed the decision of the lower court in *Riss & Co.* v. *United States,* stating as follows: "The judgment is reversed. *Wong Yang Sung* v. *McGrath,* 339 U. S. 33, 70 S. Ct. 445, 94 L. Ed. 616."

This Court's reliance on the *Wong Yang Sung* case to reverse the decision of the District Court in the *Riss & Co.* case would seem to mean at least one of three things: (1) That there is a constitutional or "due process" requirement of a hearing in cases involving requested new route authority—"due process" being the specific basis for the decision in the *Wong Yang Sung* case; (2) that the decision of the lower court in the *Riss & Co.* case is deemed to conflict with the general policy announced by the Supreme Court in the *Wong Yang Sung* case that so far as the terms of the Administrative Procedure Act warrant, the courts should "give effect to its remedial purposes where the evils it was aimed at appear"; or (3) that a requirement of a hearing is to be inferred from a statutory duty imposed on the agency to make "findings", just as such a requirement may be inferred from the due process provisions of the Constitution (see Senator McCarran's comment on the *Wong Yang Sung* case discussed at pages 15-16 and 40-43 of Eastern's petition and brief in this case).

Any one or more of the above-listed possible meanings of this Court's action in the *Riss & Co.* case would require reversal of the decision of the Court of Appeals in this case, for the two cases are closely analogous, the principal factual distinction being that the *Riss & Co.* case involved a certificate, while this case involves an exemption—a distinction without a difference, inasmuch as both involved new route authority. It is most significant that this Court has summarily rejected many of the arguments now advanced by the Board, such arguments being presented by the decision of the lower court in the *Riss & Co.* case.

B. ***Miscellaneous Points Raised in the Board's Brief Are Invalid.***

The Board's brief in this case does not elaborate the position of the Board on the substantive issues, but simply refers to the brief filed by the Board in *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board,* No. 567, which case was disposed of by this Court by its order of April 9, 1951. The discussion which follows in this section of this reply brief will be directed to two points made in the Board's brief in No. 567.

The first point so raised by the Board is the suggestion (Board's brief in No. 567, pp. 18-19) that the existence of a judicial review provision in Section 1006 of the Act does not demonstrate the need for a hearing and findings because Section 1006 (c) requires the Board to transmit to the reviewing court "a transcript of the record, *if any,* upon which the order complained of was entered" (italics added), thus indicating that there may be instances where there is no record to support an order of the Board. But that language clearly does not imply that the Board may lawfully act without evidence. At most it suggests either (1) that an order entered without evidence must be set aside by the court, since Section 1006 (e) provides that only such findings of the Board as are "supported by substantial evidence" are conclusive, and Section 10 (e) of the Administrative Procedure Act requires the reviewing court to set aside orders which are "unsupported by substantial evidence" or "unwarranted by the facts"; or (2) that in any case where there is no record before the Board, the order must be reviewed in a *de novo* trial (the authors of the Administrative Procedure Act quite evidently felt that a *de novo* trial was required "in all cases of adjudications where statutes do not require an administrative hearing"—see discussion at pp. 33-35 of Eastern's original brief). Either of the foregoing alternatives requires reversal of the decision of the Court of Appeals in this case,

as the Board's orders are not supported by evidence and Eastern was not granted a *de novo* review by the Court.

The second point raised in the Board's brief in No. 567 (pp. 21-22) is that *Frost* v. *Corporation Commission,* 278 U. S. 515 (1929) was decided under the equal protection of the law clause of the Fourteenth Amendment and therefore has no applicability here, where the due process clause of the Fifth Amendment is involved. But the Board's interpretation of the *Frost* case plainly is erroneous. Injunctive relief was sought in the *Frost* case on the grounds that *both* "the due process and equal protection of the law clauses" had been violated (278 U. S. 519), and the first section of the Supreme Court's opinion dealt with the due process question. The Court found that Frost had a "franchise" to operate a cotton gin which "constitutes a property right" (278 U. S. 520) and that the proposed operation of a competitive cotton gin without a showing of public necessity could be enjoined by Frost because it constituted "an injurious invasion of his property rights" (278 U. S. 521). Having concluded that Frost's property had been taken without due process of law by the authorization of a competitor without hearing as to public necessity, the Court then went further to hold that Frost had *also* been denied equal protection of the law.

Even though the Fifth Amendment does not contain an equal protection of the law clause, it is clear that "there might be discrimination of such an injurious character as to bring into operation the due process clause of the Fifth Amendment." *Currin* v. *Wallace,* 306 U. S. 1, 14 (1939). Plainly such discrimination has occurred here, where Piedmont has been granted—without hearing, evidence or findings—new route authority just the same as that which Eastern and other carriers could obtain only after full hearing and after making a detailed showing of public convenience and necessity.

C. *The Case Is Not Moot.*

As noted above, the Board does not appear to contend seriously that the case is moot. It concedes (pp. 10-13) that the case is governed by the principle of the *Southern Pacific Terminal Company* case, *supra.* However, the Board seems to suggest, hopefully, that (1) the *Southern Pacific Terminal Company* case may have been overruled impliedly by *Amalgamated Association* v. *Wisconsin Employment Relations Board,* 340 U. S. 416 (1951), and (2) the question of the adequacy of the Board's findings is moot.

The *Amalgamated Association* case plainly does not affect the sound principle of the *Southern Pacific Terminal Company* case. The latter case held, in effect, that the mere expiration of a short-term administrative order will not cause the appeal therefrom to become moot where similar short-term orders may continue substantially the same controversy in effect. In the *Amalgamated Association* case, the dispute between the parties had been terminated completely and there was no possibility of recurrence. Thus, this Court concluded that a decision on the merits would be merely "advisory" as it "cannot affect the rights of the litigants in the case" before the Court. On the same ground, this Court determined that case No. 567 was moot because the exemption authority had become merged in a certificate of public convenience and necessity, and therefore there was no possibility of recurrence of the exemption question.

The situation here is completely different. The original exemption authority granted to Piedmont remained in effect beyond the scheduled expiration date (December 12, 1950) by virtue of Section 9 (b) of the Administrative Procedure Act. The Board, for reasons best known to itself, has decided to issue a specific order (dated May 9, 1951) continuing the identical exemption authority in effect (see Appendix B to the Board's brief), even though such an

order was unnecessary in view of Section 9 (b) of the Administrative Procedure Act. Now, simply because the Board has issued a superfluous order, the Board contends that this case has become moot.

Surely the Board has no power to deprive this Court of jurisdiction merely by issuing an order which does not change or affect the legal status of the parties to this litigation.

But even if the Board's order of May 9, 1951, were the only authorization for Piedmont's continued exemption, this case would not be moot under the authority of the *Southern Pacific* case. There the Court said:

> "It will be observed that the order of the Commission required appellants to cease and desist from granting Young the alleged undue preference for a period of not less than two years from September 1, 1908 (subsequently extended to November 15). It is hence contended that the order of the Commission has expired, and that, the case having thereby become moot, the appeal should be dismissed.
>
> "This court has said a number of times that it will only decide actual controversies, and if, pending an appeal, something occurs, without any fault of the defendant, which renders it impossible, if our decision should be in favor of the plaintiff, to grant him effectual relief, the appeal will be dismissed. Jones v. Montague, 194 U. S. 147, 48 L. ed. 913, 24 Sup. Ct. Rep. 611, and Richardson v. McChesney, decided November 28 of this term, 218 U. S. 487, 54 L. ed. 1121, 31 Sup. Ct. Rep. 43. But in those cases the acts sought to be enjoined had been completely executed, and there was nothing that the judgment of the court, if the suits had been entertained, could have affected. The case at bar comes within the rule announced in United States v. Trans-Missouri Freight Asso., 166 U. S. 290, 308, 41 L. ed. 1007, 1016, 17 Sup. Ct. Rep. 540, and Boise City Irrig. & Land Co. v. Clark (C. C. App. 9th C.) 65 C. C. A. 399, 131 Fed. 415.
>
> "In the case at bar the order of the Commission may to some extent (the exact extent it is unnecessary

to define) be the basis of further proceedings. But there is a broader consideration. *The questions involved* in the orders of the Interstate Commerce Commission *are usually continuing* (as are manifestly those in the case at bar), *and these considerations ought not to be, as they might be, defeated; by short-term orders, capable of repetition, yet evading review,* and at one time the government and at another time the carriers, have their rights determined by the Commission *without a chance of redress.*

"In United States v. Trans-Missouri Freight Asso. supra, the object of the suit was to obtain the judgment of the court on the legality of an agreement between railroads, alleged to be in violation of the Sherman law. In the case at bar the object of the suit is to have declared illegal an order of the Interstate Commerce Commission. In that case there was an attempt to defeat the purposes of the suit by a voluntary dissolution of the agreement, and of the attempt the court said: 'The mere dissolution of the association is not the most important object of this litigation. The judgment of the court is sought upon the question of the legality of the agreement itself for the carrying out of which the association was formed, and if such agreement be declared to be illegal the court is asked not only to dissolve the association named in the bill, but that the defendants should be enjoined for the future . . . Private parties may settle their controversies at any time, and rights which a plaintiff may have had at the time of the commencement of the action may terminate before judgment is obtained, or while the case is on appeal, and in any such case the court, being informed of the facts, will proceed no further in the action. Here, however, *there has been no extinguishment of the rights* (*whatever they are*) *of the public, the enforcement of which the government has endeavored to procure* by a judgment of a court under the provisions of the act of Congress above recited. The defendants cannot foreclose those rights, nor prevent the assertion thereof by the government as a substantial trustee for the public under the act of Congress by any such action as has been taken in this case.' And, referring to the agreement as one claimed by the government as illegal,

it was further said: 'That question the government has the right to bring before the court and obtain its judgment thereof.' The interests there passed upon are no more of a public character than those involved in the order of the Interstate Commerce Commission in the case at bar, and there was no greater necessity for continuing a jurisdiction which had properly attached; and *that the government is the respondent, not complainant, does not lessen or change the character of the interests involved in the controversy, or terminate its questions.*

"In Boise City Irrig. & Land Co. v. Clark, supra, the period for which a municipal ordinance fixed a water rate expired pending the litigation as to its legality, and it was contended that the case had become moot. The court replied: 'But the courts have entertained and decided such cases heretofore, partly because the rate, once fixed, continues in force until changed as provided by law, and partly *because of the necessity or propriety of deciding some question of law presented which might serve to guide the municipal body when again called upon to act in the matter.*'

"The motion to dismiss is denied." (Italics supplied.)

Numerous other authorities could be cited for the proposition that the courts will not dismiss a case as "moot" where the matter involved is one of public interest, where the action complained of is one which is capable of repetition and likely to recur, where it is desirable in the public interest to determine the questions involved in order to provide a guide to the public officials involved for action in future case, and where judicial review of the questions involved might otherwise be "defeated, by short-term orders, capable of repetition, yet evading review." A few of the leading authorities on this point are the following: *United States* v. *Freight Assn.*, 166 U. S. 290, 307-310 (1897); *Southern Pacific Co.* v. *Interstate Comm. Comm.*, 219 U. S. 433, 452 (1911); *McGrain* v. *Daugherty*, 273 U. S. 135, 180-182 (1927); *Leonard & Leonard* v. *Earle*, 279 U. S. 392, 398 (1929); *Newport News Co.* v. *Schauffler*, 303 U. S. 54, 58

(1938): *Federal Trade Commission* v. *Goodyear Co.*, 304 U. S. 257 (1938); *Ford Motor Co.* v. *United States*, 335 U. S. 303, 313 (1948); *Papaliolios* v. *Durning*, 175 F. (2d) 73, 75 (C. C. A. 2d, 1949); *Gay Union Corporation* v. *Wallace*, 71 App. D. C. 382, 385, 112 F. (2d) 192, 195 (1940), *cert. denied*, 310 U. S. 647 (1940); *Boise City Irr. & Land Co.* v. *Clark*, 131 Fed. 415, 419 (C. C. A. 9th, 1904); *Walling* v. *Haile Gold Mines*, 136 F. (2d) 102, 105 (C. C. A. 4th, 1943); *Walling* v. *Mutual Wholesale Food & Supply Co.*, 141 F. (2d) 331, 335 (C. C. A. 8th, 1944); *Howard* v. *Wilbur*, 166 F. (2d) 884, 885 (C. C. A. 6th, 1948); *United States* v. *Workingmen's Amalgamated Council*, 54 Fed. 994, 995 (C. C. E. D. La., 1893), *aff'd*, 57 Fed. 85 (C. C. A. 5th, 1893); *United States* v. *Railway Employes' Dept.*, 286 Fed. 228 (N. D. Ill. 1923).

Eastern submits that all of the reasons announced in the foregoing authorities for refusing to dismiss cases as "moot" apply with particular force to this case. The questions involved herein are of great public importance, inasmuch as the Board's power to accomplish by exemption, and *without hearing*, the very same things with respect to which a hearing would be required under the certificate provisions of the Act (Section 401) is presented. If the Board can permit air carriers to evade the requirements of Section 401 simply by the extensive use of the exemption power under Section 416 (b), without hearing, the certificate provisions of the Act are completely meaningless.

It is of greatest importance that the Court render a decision in this case for the future guidance of the Board, the air carriers and the general public. Exemptions of various types are constantly being granted by the Board.

It is apparent that the principle announced by the Court of Appeals in this case is, and is intended to be, applicable to exemptions of the broadest possible scope, including exemptions, as here, whereby certificated routes are exactly duplicated; and the Court of Appeals is asserting that the Board has the power to duplicate any major cer-

tificated route by exemption without affording the certificated carrier any hearing. The Board's brief in No. 567 (p. 16) attempts to intimate, although it carefully refrains from saying, that the asserted exemption power might not be so broad as to "permit the Board to establish a new Chicago-Salt Lake City route by exemption without hearing" or "authorize the acquisition of American Overseas Airlines, Inc., by Pan American World Airways, Inc., and the transfer of the certificates of the former to the latter by exemption without hearing or without reference to the President." But if the Board has the power to duplicate without hearing a certificated route between Winston-Salem and Charleston, what basis is there for supposing that the Board has no similar power to duplicate the Chicago-Salt Lake City route by exemption without hearing? Certainly the Act furnishes no basis for distinguishing between routes of moderate length and those which are transcontinental in scope insofar as the requirement of a hearing before exemption is concerned.

Moreover, the very decision of the Board cited in the Board's brief in No. 567 (p. 16) apparently to show that the Board is not claiming "unrestricted power of exemption" (*Re Large Irregular Carriers, Exemption Applications,* Order E-4240 *et al.,* May 25, 1950), illustrates the sweeping power which the Board claims to duplicate certificated services by exemption. The Irregular Carriers, granted exemption, were authorized to provide service between the major traffic centers of the nation—New York, Chicago, Los Angeles, etc. While the Board sought to limit the number of schedules which could be provided by such carriers, the Board's action in permitting Large Irregular Carriers wastefully to divert traffic from certificated carriers between major points highlights the sweeping character of the exemption power which the Board claims, and the extremely serious nature of the principle announced by the Court of Appeals that exemptions may be granted without hearing.

The Board's brief asserts (p. 12) that the question of the adequacy of the Board's findings to support its expired exemption orders is moot. In view of the fact that the Board issues many exemption orders with precisely the same "findings" involved in this case—"mere parroting of findings or conclusions in the words of statutes" (see Eastern's brief in support of petition, p. 53)—it seems clear that the question of the adequacy of such findings is a "continuing" and "recurring" one, the determination of which "ought not to be * * * defeated, by short-term orders, capable of repetition, yet evading review." *Southern Pacific Terminal Company* case, *supra.* The "findings" in the Board's order of May 9, 1951, are of precisely the same type. It is particularly shocking that the Board should assert the power, by use of "short-term orders," to handle all major matters under the Act purely on the basis of a "belief" and without the necessity for findings of any kind (see discussion at pages 51 *ff.* of Eastern's brief),—avoiding judicial review of such extraordinary procedure.

Application to this case of the doctrine of the *Southern Pacific Terminal Company* case and the other cases cited above requires that the Court proceed to a decision on the very important questions raised by Eastern's petition for writ of certiorari, so that the Board's "short-term orders, capable of repetition," shall not wholly escape review and lead to destruction or serious impairment of the air transport system contemplated by Congress.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be granted and that the decision of the Court of Appeals should be reversed.

Respectfully submitted,

E. SMYTHE GAMBRELL,
Attorney for Petitioner.

E. SMYTHE GAMBRELL,
W. GLEN HARLAN,
HAROLD L. RUSSELL,
CHARLES A. MOYE, JR.,
Atlanta, Georgia,

Of Counsel.

May 29, 1951.